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Appeals
Vol. 3171

Vol 3172

No. 16447

United States
Court of Appeals
for the Ninth Circuit

LEROY HEIN, STUART J. MASTERS, LAWRENCE COX, VINCENTE OTIZ, RAY H. ROBINSON, J. SLOAN, ART COLEMAN, and LEW CORNELIUS, Appellants,

vs.

FIANZA CIA, NA. S.A., a corporation and FRACHTEN TREUHAND GNBH, a corporation, Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—7-1-59

No. 16447

United States
Court of Appeals
for the Ninth Circuit

LEROY HEIN, STUART J. MASTERS, LAWRENCE COX, VINCENTE OTIZ, RAY H. ROBINSON, J. SLOAN, ART COLEMAN, and LEW CORNELIUS, Appellants,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

TANNER AND CARNEY,
RICHARD R. CARNEY,

Pacific Building,
Portland 4, Oregon,

For Appellants.

WOOD, MATTHIESSEN, WOOD AND TATUM,
JOHN D. MOSSER,
ROBERT C. SHOEMAKER,

1310 Yeon Building,
Portland 4, Oregon,

For Appellees.

In the United States District Court
For the District of Oregon

No. Civ. 10101

Fianza Cia. Nav. S. A., a corporation, and Frachten Treuhand GNBH., a corporation, Plaintiffs,

vs.

William Benz, John Doe 1, John Doe 2, John Doe 3 and John Doe 4, individually and as representatives of all of the members of the Sailors' Union of the Pacific;

H. A. Robinson, James Doe 1, James Doe 2, James Doe 3 and James Doe 4, individually and as representatives of all of the members of the Marine Cooks and Stewards;

Ray H. Robinson, Joe Doe 1, Joe Doe 2, Joe Doe 3 and Joe Doe 4, individually and as representatives of all of the members of the Marine Engineers Beneficial Association Local No. 41;

J. Sloan, Richard Doe 1, Richard Doe 2, Richard Doe 3 and Richard Doe 4, individually and as representatives of all of the members of the National Order of Masters, Mates and Pilots Local No. 90;

Carl H. Anderson, Ernest E. Baker and William Doe 1, William Doe 2, William Doe 3 and William Doe 4, individually and as representatives of all of the members of the International Longshoremen's and Warehousemen's Union Local No. 8;

Arthur Coleman, Frank Doe 1, Frank Doe 2, Frank Doe 3 and Frank Doe 4, individually and as representatives of all of the members of the Marine Firemen's Union;

Michael E. Steele, Ed Doe 1, Ed Doe 2, Ed Doe 3 and Ed Doe 4, individually and as representatives of all of the members of the Joint Council of Teamsters No. 37;

Lew Cornelius, Sam Doe 1, Sam Doe 2, Sam Doe 3 and Sam Doe 4, individually and as representatives of all of the members of Teamsters' Local No. 162;

William Benz, Robert Doe 1, Robert Doe 2, Robert Doe 3 and Robert Doe 4, individually and as representatives of all of the members of Seafarers' International Union A. F. of L., C. I. O.;

Ralph Doe 1, Ralph Doe 2, Ralph Doe 3, and Ralph Doe 4, individually and as representatives of all of the members of National Maritime Union,

Defendants.

COMPLAINT

Plaintiffs complain of defendants and for cause of suit allege as follows:

I.

Plaintiff Fianza Cia. Nav. S. A. is, and at all times herein mentioned was, a corporation duly incorporated and existing under and by virtue of the laws of the Republic of Panama.

II.

Plaintiff Frachten Treuhand GNBH is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of Germany.

III.

Defendants Sailors' Union of the Pacific, Marine Cooks and Stewards, Marine Engineers Beneficial Association Local No. 41, National Order of Mas-

ters, Mates and Pilots Local No. 90, International Longshoremen's and Warehousemen's Union Local No. 8, Marine Firemen's Union, Joint Council of Teamsters No. 37, Teamsters' Local No. 162, Seafarers' International Union A. F. of L., C. I. O., and National Maritime Union, are each unincorporated associations having rules and regulations by virtue of which members thereof act as organized bodies. Each of said organizations has a membership upwards of 1,000 men, and it would be impractical and impossible to join all of the members of any or all of said organizations as defendants in this suit.

IV.

The defendant William Benz is the Port Agent of the Sailors' Union of the Pacific at the Port of Portland, Oregon, and the defendants John Doe 1, John Doe 2, John Doe 3 and John Doe 4 are members of said Union.

V.

The defendant H. A. Robinson is the Business Agent of the Marine Cooks and Stewards at the Port of Portland, Oregon, and the defendants James Doe 1, James Doe 2, James Doe 3 and James Doe 4 are members of said Union.

VI.

The defendant Ray H. Robinson is the Business Manager of the Marine Engineers Beneficial Association Local No. 41 at the Port of Portland, Oregon, and the defendants Joe Doe 1, Joe Doe 2, Joe Doe 3 and Joe Doe 4 are members of said Union.

VII.

The defendant J. Sloan is the Port Agent of the

National Organization of Masters, Mates and Pilots Local No. 90 at Portland, Oregon, and the defendants Richard Doe 1, Richard Doe 2, Richard Doe 3 and Richard Doe 4 are members of said Union.

VIII.

The defendant Carl H. Anderson is the Secretary and the defendant Ernest E. Baker is the Business Agent at Portland, Oregon, of the International Longshoremen's and Warehousemen's Union Local No. 8, and the defendants William Doe 1, William Doe 2, William Doe 3 and William Doe 4, are members of said Union.

IX.

The defendant Arthur Coleman is the Business Agent of the Marine Firemen's Union at Portland, Oregon, and the defendants Frank Doe 1, Frank Doe 2, Frank Doe 3 and Frank Doe 4 are members of said Union.

X.

The defendant Michael E. Steele is the President of the Joint Council of Teamsters No. 37 at Portland, Oregon, and the defendants Ed Doe 1, Ed Doe 2, Ed Doe 3 and Ed Doe 4 are members of said Union.

XI.

The defendant Lew Cornelius is the Secretary-Treasurer of the Teamsters' Local No. 162 at Portland, Oregon, and the defendants Sam Doe 1, Sam Doe 2, Sam Doe 3 and Sam Doe 4 are members of said Union.

XII.

The defendants William Benz, Robert Doe 1, Rob-

ert Doe 2, Robert Doe 3 and Robert Doe 4 are each members of the Seafarers' International Union A. F. of L., C. I. O. or persons picketing on its behalf as hereinafter alleged. Seafarers' International Union A. F. of L., C. I. O. has no local officers at the Port of Portland, Oregon.

XIII.

The defendants Ralph Doe 1, Ralph Doe 2, Ralph Doe 3 and Ralph Doe 4 are each members of the National Maritime Union or persons picketing on its behalf as hereinafter alleged. National Maritime Union has no local officers at the Port of Portland, Oregon.

XIV.

Each of said individually named defendants is sued not only individually but also as representatives of all of the members of the unincorporated association of which such individual defendants are officers or members as herein alleged. Each of said individually named defendants are citizens and residents of the State of Oregon. Plaintiffs, and each of them, are citizens and inhabitants of a State or Country different from that of each of the defendants.

XV.

Plaintiffs will substitute the real and true names of the defendants Doe as soon as the same are ascertained by them, said Doe names being fictitious.

XVI.

Plaintiff Fianza Cia. Nav. S. A. is the owner and operator of the MV Capetan Yemelos. Said Capetan

Yemelos is a vessel of 14,551 dead weight tons, constructed in Japan in 1956, and which is now and ever since its launching has been duly registered at the Port of Monrovia, Liberia and flying the Liberian flag as a vessel with Liberian registry.

XVII.

On December 1, 1958, said SS Capetan Yemelos arrived at the Port of Portland, Oregon, to load a cargo of barley, pursuant to a voyage charter for said vessel made by said owner with Frachten Treuhand GNBH for the carriage of said cargo from the Port of Portland, Oregon to a Port within the Antwerp-Hamburg Range on the Continent of Europe. On its arrival at Portland, said vessel docked at the Irving Dock where it now is.

XVIII.

Said M.V. Capetan Yemelos had on its arrival at Portland aboard a full crew of officers and men who, with one exception, were of Greek nationality, the one exception being a British subject of Greek extraction. All of said officers and men had signed a form of Articles regularly prescribed by the Liberian Government, which Articles are unexpired and in effect and which govern the wages and other terms and conditions of employment of said officers and crew aboard said vessel. The wage scale specified in said Articles for each officer and other member of the crew equals or exceeds the prevailing rates paid for the same positions aboard Greek flag vessels. At no time herein mentioned was there, nor is there now, any dispute between the owners of

said vessel or her master and any of the members of the crew of said vessel concerning wages, hours or conditions of employment aboard said vessel.

XIX.

Upon its arrival at the Port of Portland early in the morning of December 17, 1958, two or more persons appeared and began to patrol at and near the gangway of said vessel, wearing placards stating:

"Runaway
Flagships
Threaten American
Merchant Marine
National Security
Protest
Against
S.S. Capetan Yemelos"

The real and true names of said pickets and of other persons who have since been and are now picketing said vessel are unknown to plaintiffs. Said persons are identified by said placards as representing the International Transport Workers Federation, with which all of the unincorporated labor organizations whose members are defendants herein are affiliated.

XX.

Said picketing was being carried out by said men acting as agents of defendants and each and all of them, and pursuant to a Resolution adopted by the International Transport Workers Federation at Hamburg, Germany, on or about November 14, 1958. The unincorporated associations of which defend-

ants are members, with the exception of the International Longshoremen's and Warehousemen's Union Local No. 8, are all affiliates of said International Transport Workers Federation; all of said unincorporated associations whose members are defendants herein, including the International Longshoremen's and Warehousemen's Union Local No. 8, have ratified and approved said action taken by the International Transport Workers Federation and their members have conspired together to act in concert for the purpose of said picketing.

XXI.

Said picketing was and is intended to induce employees of employers with whom plaintiffs have contracts for the loading and supplying of said vessel and other persons having business aboard said vessel from entering upon, working upon or carrying out their business with plaintiffs aboard said vessel, and was and is intended to prevent and discourage persons desiring to charter vessels for the carriage of cargo from dealing with plaintiffs, and particularly from chartering the M.V. Capetan Yemelos, all with the ultimate purpose of unfairly restraining trade and eliminating from competition therein vessels registered under the Liberian flag and particularly the M.V. Capetan Yemelos.

XXII.

There is no labor dispute between plaintiffs or either of them and the defendants or any of them or between the members of the crew of said M.V. Capetan Yemelos and the defendants or any of

them. None of the defendants has made any demand upon plaintiffs, the Master of said vessel or any local agent for said vessel concerning wages, hours or working conditions aboard said vessel, or the right to represent employees aboard said vessel.

XXIII (Amended)

As a result of said picketing employees of independent contractors with whom plaintiffs had contracts have been persuaded and induced not to carry on their work aboard said vessel and said vessel has been entirely idle. Plaintiffs have been prevented from continuing the operation of the vessel and from fulfilling contractual obligations which they have assumed. Plaintiff Fianza Cia. Nav. S. A. is suffering damage while such picketing continues in an amount in excess of $1,500.00 per day for the loss of use of said vessel and if said picketing is continued will be prevented from employing said vessel and from carrying out the terms of said charter party and may lose other charter parties. As a result of said vessel's inability to load, demand was made upon plaintiffs by the owners of said Irving Dock that the vessel leave said Dock at 11:00 A.M. December 1, 1958, or pay damages at the rate of $100.00 per hour thereafter in accordance with the tariff published by the owners of said Dock; but as a result of defendants' said picketing and concerted action, plaintiffs were unable to secure a pilot or tugs necessary to move the vessel from said dock. In addition to the foregoing, the plaintiffs and each of them have and are continuing to suffer irrepar-

able damage and injury to their reputations for honesty, fair dealing and the carrying out of contractual obligations. All of the acts of the defendants and each of them hereinabove described were designed to and have caused plaintiffs irreparable loss of business and earnings and unless the acts of defendants are restrained by this Court plaintiffs will continue to suffer such irreparable damage in addition to monetary damage above specified.

XXIV.

Plaintiffs have no plain, speedy or adequate remedy available to them at law or otherwise than in equity.

Wherefore, plaintiffs pray that this Court make and enter orders as follows:

1. Requiring the defendants, and each of them, to show cause in this Court on a date and time stated in said order why they and each of them should not be restrained and enjoined from engaging in each and all of the acts hereinabove described;

2. Restraining and enjoining pendente lite the defendants and each of them and all persons, unions and organizations of employees acting by, through or under them and all members of unions and organizations acting in concert with them, from engaging in each and all of the acts herein complained of and particularly restraining and enjoining them, and each of them, and all persons, unions and organizations acting by, through or under them, from picketing or patrolling at or near the gangplank of the M.V. Capetan Yemelos, or at any point where

it is necessary for persons having business with said vessel to pass, or from doing any other act or thing tending to prevent plaintiffs from continuing the voyage of the vessel;

3. Restraining and enjoining the defendants and each of them and all persons, unions and organizations of employees acting by, through or under them and all members of unions and organizations acting in concert with them, from engaging in each and all of the acts herein complained of and particularly restraining and enjoining them, and each of them, and all persons, unions and organizations acting by, through or under them, from picketing or patrolling at or near the gangplank of the MV Capetan Yemelos, or at any point where it is necessary for persons having business with said vessel to pass, or from doing any other act or thing tending to prevent plaintiffs from continuing the voyage of the vessel;

4. Awarding to plaintiff Fianza Cia. Nav. S. A. damages in the sum of $1,500.00 and its accruing damages at the rate of $1,500.00 per day for the loss of use of said vessel and $100.00 per hour, or such other sum as plaintiffs may become liable for due to their inability to move the vessel upon request, and plaintiffs' costs and disbursements; and

5. For such other and further relief as the court may deem just and equitable in the premises.

WOOD, MATTHIESSEN, WOOD & TATUM,
/s/ JOHN D. MOSSER,
Attorneys for Plaintiffs.

[Endorsed]: Filed December 2, 1958.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

It appearing to the Court from the complaint and from the records and files herein that plaintiffs have moved for an order to show cause and that an order to show cause should be issued,

It is Hereby Ordered, Adjudged and Decreed that Wednesday the 3rd day of December, 1958, at the hour of 10:00 A.M. o'clock be and the same hereby is set for defendants to appear in the courtroom of this Court to show cause, if any there be, why an injunction pendente lite should not be granted restraining and enjoining the defendants, and each of them, and all persons acting by, through and under them, or any of them, from picketing and patrolling at and near the MV Capetan Yemelos and at points and places which must be passed by workmen and others having business on said vessel.

Dated this 2nd day of December, 1958.

/s/ WILLIAM G. EAST,
District Judge.

[Endorsed]: Filed December 2, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly for hearing before the undersigned Judge of the above entitled

Court at Portland, Oregon, on December 3, 1958 upon an order to show cause why an injunction pendente lite should not be issued against the defendants as prayed for in the complaint on file herein, plaintiffs appearing by their attorneys, Wood, Matthiessen, Wood & Tatum, John D. Mosser and Robert Shoemaker, Jr. of counsel, defendants John Doe 1, whose real and true name is Ray Hein, James Doe 1, whose real and true name is Stuart J. Masters, James Doe 2, whose real and true name is Laurence Cox, James Doe 3, whole real and true name is Vincente Otiz, Ray H. Robinson, J. Sloan, Art Coleman, Ed Doe 1, whose real and true name is Lew Cornelius, and Lew Cornelius appearing by their attorneys Tanner and Carney, Richard R. Carney and Tolbert McCarroll of counsel, the other individually named defendants not having been served and appearing not, counsel having made opening statements, testimony and other evidence having been offered and received, various stipulations having been made by counsel during the course of the proceeding and in final argument to the Court, the Court having considered the evidence, stipulations and arguments of counsel and having rendered its opinion, makes the following

Findings of Fact

I.

Plaintiff Fianza Cia. Nav. S. A. is, and at all times herein mentioned was, a corporation duly incorporated and existing under and by virtue of the laws of the Republic of Panama.

II.

Plaintiff Frachten Treuhand GNBH is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of Germany.

III.

Said individually named and served and appearing defendants are each citizens and residents of the State of Oregon and of a State or County different from that of each of the plaintiffs.

IV.

Defendant John Doe 1, whose real and true name is Ray Hein, is a member of the Sailors' Union of the Pacific.

V.

Defendants James Doe 1, 2 and 3, whose real and true names are Stuart J. Masters, Laurence Cox and Vincente Otiz respectively, are members of the Marine Cooks and Stewards.

VI.

Defendant Ray H. Robinson is the Business Manager of the Marine Engineers Beneficial Association Local No. 41.

VII.

Defendant J. Sloan is the Port Agent of the National Organization of Masters, Mates and Pilots Local No. 90 at Portland, Oregon.

VIII.

Defendant Art Coleman is the Business Agent of the Marine Firemen's Union at Portland, Oregon.

IX.

Defendant Ed Doe 1, whose real and true name is Lew Cornelius, is the Secretary-Treasurer of the Joint Council of Teamsters No. 37 at Portland, Oregon, and said defendant Lew Cornelius is also the Secretary Treasurer of the Teamsters' Local No. 162 at Portland, Oregon.

X.

Each of said individually named defendants was sued not only individually but also as a representative of all of the members of the unincorporated association of which said individual defendant is an officer or member. For the purposes of the hearing held and the relief hereinafter concluded due plaintiffs, each of said individually named defendants is a proper representative of all of the members of the unincorporated association of which such individual defendant is an officer or member.

XI.

Plaintiff Fianza Cia. Nav. S. A. is the owner and operator of the MV Capetan Yemelos. Said Capetan Yemelos is a vessel of 14,551 dead weight tons, constructed in Japan in 1956, and which is duly registered at the Port of Monrovia, Liberia and flying the Liberian flag as a vessel with Liberian registry.

XII.

On December 1, 1958, said SS Capetan Yemelos arrived at the Port of Portland, Oregon, to load a cargo of barley, pursuant to a voyage charter for said vessel made by said owner with Frachten Treu-

hand GNBH for the carriage of said cargo from the Port of Portland, Oregon to a Port within the Antwerp-Hamburg Range on the Continent of Europe. On its arrival at Portland, said vessel docked at the Irving Dock where it now is.

XIII.

Said MV Capetan Yemelos had on its arrival at Portland aboard a full crew of officers and men who, with one exception, were of Greek nationality, the one exception being a British subject of Greek extraction. All of said officers and men had signed a form of Articles regularly prescribed by the Liberian Government, which Articles were opened in a foreign port and are unexpired and in effect and which govern the wages and other terms and conditions of employment of said officers and crew aboard said vessel. The wage scale specified in said Articles for each officer and other member of the crew is in accord with the prevailing rates paid for the same positions aboard Greek flag vessels pursuant to a collective agreement negotiated between all Greek Seamen's Unions and shipowners. At no time herein mentioned was there, nor is there now, any dispute between the owners of said vessel or her master and any of the members of the crew of said vessel concerning wages, hours or conditions of employment aboard said vessel.

XIV.

Upon its arrival at the Port of Portland early in the morning of December 1, 1958, various persons, including the defendants James Doe 1, James Doe 2

and James Doe 3, whose real and true names respectively are Stuart J. Masters, Laurence Cox and Vincente Otiz, appeared and began to patrol at and near the gangway of said vessel, wearing placards stating:

"Runaway
Flagships
Threaten American
Merchant Marine
National Security
Protest
Against
S.S. Capetan Yemelos"

Said persons were identified by said placards as representing the International Transport Workers Federation, with which all of the unincorporated labor organizations whose members are herein defendants are affiliated.

XV.

Said patrolling was being carried out by said men acting as agents for the Marine Cooks and Stewards Union and the Sailors Union of the Pacific; and patrolling of said vessel was also carried on by members of the Marine Fireman's Union acting as agents for said union. That no patrolling of said vessel was carried on by members of or on behalf of the National Organization of Masters, Mates and Pilots Local 90, the Marine Engineers Beneficial Association Local No. 41, Joint Council of Teamsters No. 37, or Teamsters Local No. 162, except that all of said patrolling was pursuant to a resolu-

tion adopted by the International Transport Workers Federation at Hamburg, Germany, on or about November 14, 1958.

XVI.

There is no labor dispute between plaintiffs or either of them and the defendants or any of them or between the members of the crew of said MV Capetan Yemelos and the defendants or any of them. None of the defendants has made any demand upon plaintiffs, the Master of said vessel or any local agent for said vessel concerning wages, hours or working conditions aboard said vessel, or the right to represent employees aboard said vessel.

XVII.

The owner, operator and charter of said vessel are entirely foreign and not controlled directly or indirectly by United States citizens who might be under a duty to bargain collectively with American Unions.

XVIII.

As a result of said patrolling employees of independent contractors with whom plaintiffs had contracts have been persuaded and induced not to carry on their work aboard said vessel and said vessel has been entirely idle. Plaintiffs have been prevented from continuing the operation of the vessel and from fulfilling contractual obligations which they have assumed. Plaintiff Fianza Cia. Nav. S. A. is suffering damage while such patrolling continues in an amount in excess of $1,500.00 per day for the loss of use of said vessel and if said

picketing is continued will be prevented from employing said vessel and from carrying out the terms of said charter party and may lose other charter parties. As a result of said vessel's inability to load, demand was made upon plaintiffs by the owners of said Irving Dock that the vessel leave said Dock at 11:00 A.M. December 1, 1958, or pay damages at the rate of $100.00 per hour thereafter in accordance with the tariff published by the owners of said Dock; but as a result of defendants' said patrolling, plaintiffs were unable to secure a pilot or tugs necessary to move the vessel from said dock. In addition to the foregoing, the plaintiffs and each of them have and are continuing to suffer irreparable damage and injury to their reputations for honesty, fair dealing and the carrying out of contractual obligations. All of the acts of the defendants and each of them hereinabove described were designed to and have caused plaintiffs irreparable loss of business and earnings and unless the acts of defendants are restrained by this Court plaintiffs will continue to suffer such irreparable damage in addition to monetary damage above specified.

XIX.

Plaintiffs own, charter and operate other vessels calling at the Port of Portland and other ports within the jurisdiction of this Court in international trade and commerce.

XX.

Defendants will continue to patrol and protest

against said MV Capetan Yemelos and to take similar action and other harassing action against other vessels of the plaintiffs of a similar nature unless restrained and enjoined from so doing.

XXI.

All of said patrolling and protesting by defendants has been entirely peaceful, and without violence or threats of violence.

XXII.

Plaintiffs have no adequate remedy at law.

Whereupon the Court makes the following

Conclusions of Law

I.

The Court has jurisdiction of the parties and the subject matter by reason of diversity of citizenship and an amount in controversy in excess of $10,000.

II.

Both because the term "labor dispute", as used in the Norris-LaGuardia Act, Oregon's Little Norris-LaGuardia Act, the Taft-Hartley Act, and other statutes of the United States and Oregon, does not contemplate a dispute entirely foreign in nature such as that here presented, and because the evidence does not otherwise show it, there is no labor dispute between plaintiffs, or any of them, and defendants, or any of them, nor between defendants, or any of them and the officers and members of the crew of the MV Capetan Yemelos, or any of them, nor between plaintiffs, or either of them and any of the officers or members of the crew of said vessel.

III.

The patrolling and protesting by some of defendants pursuant to said Resolution of the International Transport Workers Federation and their threats to continue the same constitute acts of unlawful interference with and restraint upon international commerce, and particularly the right of plaintiffs to carry out an international voyage and charter with a vessel owned, operated and chartered by foreign citizens and lawfully registered by a friendly foreign nation and manned by an alien crew under foreign shipping Articles.

IV.

Plaintiffs are entitled to an order restraining and enjoining the individually named defendants who appeared herein and all of the members of the respective Unions of which they are members and officers, as set forth in Finding IV-IX during the pendency of this suit, from patrolling, placing signs or distributing printed matter protesting the MV Capetan Yemelos, or any other vessel registered under a foreign flag and manned by an alien crew under foreign Articles and owned, operated or chartered by the plaintiffs or either of them that may hereafter arrive within the jurisdiction of this Court, or protesting the registry of said MV Capetan Yemelos or any other such vessel of the plaintiffs under a foreign flag, at or near the gangplank of said MV Capetan Yemelos or any other such vessel of the plaintiffs or at or near any dock where said MV Capetan Yemelos or any other such vessel

of the plaintiffs may be berthed or at any other place where it is necessary for persons having business with said MV Capetan Yemelos or any other such vessel of the plaintiffs to pass, within the jurisdiction of this Court, or from doing any other act or thing tending to prevent plaintiffs from loading any of said vessels or otherwise continuing the use of any such vessel in trade and commerce.

V.

An injunction bond in the amount of $500.00 shall be filed by plaintiffs.

Dated this 4th day of December, 1958, at 12:00 A. o'clock at Portland, Oregon.

/s/ WILLIAM G. EAST,
United States District Judge.

[Endorsed]: Filed December 4, 1958.

In The United States District Court
For The District of Oregon

No. 10101

FIANZA CIA, NAV. S. A., a corporation, and FRACHTEN TREUHAND GNBH., a corporation, Plaintiffs,

vs.

WILLIAM BENZ, et al., Defendants.

INTERLOCUTORY INJUNCTION

This matter having come on regularly for hear-

ing before the undersigned judge of the above entitled court at Portland, Oregon, on December 3, 1958 upon an order to show cause why an injunction pendente lite should not be issued against the defendants as prayed for in the complaint on file herein, plaintiffs appearing by their attorneys Wood, Matthiessen, Wood & Tatum, John D. Moser and Robert Shoemaker, Jr. of counsel, defendants John Doe 1, whose real and true name is Ray Hein, James Doe 1, whose real and true name is Stuart J. Masters, James Doe 2, whose real and true name is Laurence Cox, James Doe 3, whose real and true name is Vincente Otiz, Ray H. Robinson, J. Sloan, Art Coleman, Ed Doe 1, whose real and true name is Lew Cornelius, and Lew Cornelius appearing by their attorneys Tanner and Carney, Richard R. Carney and Tolbert McCarroll of counsel, the other individually named defendants not having been served and appearing not, counsel having made opening statements, testimony and other evidence having been offered and received, various stipulations having been made by counsel during the course of the proceeding and in final argument to the Court, the Court having considered the evidence, stipulations and arguments of counsel and having rendered its opinion and made and filed its Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed that the defendant John Doe 1, whose real and true name is Ray Hein, individually and as a representative of all of the members of the Sailors Union of the Pacific, James Doe 1, James Doe 2 and James Doe

3, whose real and true names respectively are Stuart J. Masters, Laurence Cox and Vincente Otiz, individually and as representatives of all of the members of the Marine Cooks and Stewards, Ray H. Robinson, individually and as a representative of all of the members of the Marine Engineers Beneficial Association Local No. 41, J. Sloan, individually and as a representative of all of the members of the National Organization of Masters, Mates and Pilots Local No. 90, Art Coleman, individually and as a representative of all of the members of the Marine Fireman's Union, Ed Doe 1, whose real and true name is Lew Cornelius, individually and as a representative of all of the members of the Joint Council of Teamsters No. 37, Lew Cornelius, individiually and as a representative of all of the members of Teamsters Local No. 162, and all of the members of the Sailors Union of the Pacific, Marine Cooks and Stewards, Marine Engineers Beneficial Association Local No. 41, National Organization of Masters, Mates and Pilots Local No. 90, Marine Fireman's Union, Joint Council of Teamsters No. 37 and Teamsters Local No. 162, and all other persons acting for, by, through, under or in concert with them, Be And They Hereby Are Restrained And Enjoined, during the pendency of this suit from patrolling, placing signs or distributing printed matter protesting the MV Capetan Yemelos or any other vessel registered under a foreign flag and manned by an alien crew under foreign Articles and owned, operated or chartered by the plaintiffs or either of them that may here-

after arrive within the jurisdiction of this Court, or protesting the registry of said MV Capetan Yemelos or any other such vessel of the plaintiffs under a foreign flag, at or near the gangplank of said MV Capetan Yemelos or any other such vessel of the plaintiffs or at or near any dock where said MV Capetan Yemelos or any other such vessel of the plaintiffs may be berthed or at any other place where it is necessary for persons having business with the said MV Capetan Yemelos or any other such vessel of the plaintiffs to pass, within the jurisdiction of this Court, or from doing any other act or thing tending to prevent plaintiffs from loading any of said vessels or otherwise continuing the use of any such vessel in trade and commerce.

It Is Further Ordered that the United States Marshal for the District of Oregon be and he hereby is ordered and directed to serve a copy of this order upon all persons doing any of the things hereby restrained and enjoined.

Dated this 4th day of December, 1958 at 12:00 M.

/s/ WILLIAM G. EAST,
United States District Judge.

Tendered by

/s/ JOHN D. MOSSER,
Of Counsel for Plaintiffs.

[Endorsed]: Filed December 4, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Fianza Cia, Nav. S. A., a corporation, and Frachten Treuhand GNBH., a corporation, plaintiffs above named, and to Wood, Matthiessen, Wood & Tatum and John D. Mosser, their attorneys:

You, and Each of You, will please take notice that defendants Leroy Hein, Stuart J. Masters, Lawrence Cox, Vincente Otiz, Ray H. Robinson, J. Sloan, Art Coleman, Lew Cornelius, and each of them, intend to appeal and do hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain Interlocutory Injunction entered in the above entitled court and cause on or about December 4, 1958, wherein and whereby the defendants above named, and each of them, individually and as representatives of the members of various unions, and all other persons acting for, by, through, under, or in concert with them, were restrained and enjoined during the pendency of the above entitled suit from patrolling, placing signs or distributing printed matter protesting the MV Capetan Yemelos, or any other vessel registered under a foreign flag and manned by an alien crew under foreign articles and owned, operated or chartered by the plaintiffs, or either of them, that may hereafter arrive within the jurisdiction of this court and from doing the other things set out in said injunction order, and said defendants appeal from

said Interlocutory Injunction and from each and every part thereof, pursuant to the provisions of Title 29 USCA Section 110 and Title 28 USCA Section 1292.

Dated December 30, 1958.

TANNER & CARNEY,
/s/ RICHARD R. CARNEY,
Attorneys for Defendants.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 31, 1958.

[Title of District Court and Cause.]

BOND

Know All Men By The Presents: That we, LeRoy Hein, Stuart J. Masters, Laurence Cox, Vincente Otiz, Ray H. Robinson, J. Sloan, Art Coleman, and Lew Cornelius as principals, and Mabel Doane as surety, are each held and firmly bound unto Fianza Cia, Nav. S. A. and Frachten Treuhand Gnbh., in the sum of Two Hundred Fifty ($250.00) Dollars, lawful money of the United States of America, to be paid to the said Fianza Cia, Nav. S. A. and Frachten Treuhand Gnbh., which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Now The Condition of this obligation is such that if the above bounden, LeRoy Hein, Stuart J. Mas-

ters, Laurence Cox, Vincente Otiz, Ray H. Robinson, J. Sloan, Art Coleman and Lew Cornelius as principals, and Mabel Doane as surety, shall well and truly pay or cause to be paid unto the above named Fianza Cia, Nav. S. A. and Frachten Treuhand Gnbh., the costs adjudged herein if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the injunction is modified, then this obligation shall be void; otherwise to remain in full force and effect.

Witness our hands and seals this 31st day of December, 1958.

/s/ RAY H. ROBINSON,
/s/ J. SLOAN,
/s/ ART COLEMAN,
/s/ LEW CORNELIUS,
Principals.

/s/ LeROY HEIN, R.R.C.,
/s/ STUART J. MASTERS,
/s/ LAURENCE COX,
/s/ VINCENTE OTIZ,
Principals.

/s/ MABEL DOANE,
Surety.

State of Oregon,
County of Multnomah—ss.

I, Mabel Doane, being first duly sworn, on oath depose and say: That I as a resident of said county and state, and a freeholder therein, and am worth the sum of $500.00 over and above all my just debts

and legal liabilities, and exclusive of property exempt from execution, so help me God.

/s/ MABEL DOANE.

Subscribed and sworn to before me this 31st day of December, 1958.

[Seal] /s/ RICHARD R. CARNEY,
Notary Public for Oregon. My Commission Expires March 22, 1962.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 31, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH DEFENDANTS INTEND TO RELY UPON APPEAL

Come now the defendants Leroy Hein, Stuart J. Masters, Lawrence Cox, Vincente Otiz, Ray H. Robinson, J. Sloan, Art Coleman, Lew Cornelius, and each of them, and state that the following are the points upon which said defendants intend to rely on appeal:

I.

The court erred in making Conclusion of Law No. I in which the court concluded that it had jurisdiction of the parties and the subject matter by reason of diversity of citizenship and an amount in controversy in excess of $10,000.00, for the reason that the evidence fails to show an amount in controversy in excess of $10,000.00 and for the rea-

son that there is a lack of diversity required of all the parties on one side as against all the parties on the other side because such diversity is determined by the citizenship of the individual members of the unions sued as a class in this suit.

II.

The court erred in making Finding of Fact No. XVI and Conclusion of Law No. II that there is no labor dispute and in failing to find that this case was one involving or growing out of a labor dispute within the meaning of the Norris-LaGuardia Act.

III.

The court erred in making Conclusion of Law No. III in which the court concluded as follows:

> "The patrolling and protesting by some of defendants pursuant to said Resolution of the International Transport Workers Federation and their threats to continue the same constitute acts of unlawful interference with and restraint upon international commerce, and particularly the right of plaintiffs to carry out an international voyage and charter with a vessel owned, operated and chartered by foreign citizens and lawfully registered by a friendly foreign nation and manned by an alien crew under foreign shipping Articles."

on the ground and for the reason that the conduct of the defendants in patrolling and protesting did not constitute unlawful conduct either under the

laws of the United States or the laws of the State of Oregon.

IV.

The court erred in making Conclusion of Law No. IV to the effect that plaintiffs are entitled to a restraining order enjoining the defendants from patrolling or picketing its vessel for the reason that the court is without jurisdiction to grant such injunctive relief by the provisions of the Norris-LaGuardia Act.

V.

The court erred in making Finding of Fact No. XVII which reads as follows:

> "The owner, operator and charter of said vessel are entirely foreign and not controlled directly or indirectly by United States citizens who might be under a duty to bargain collectively with American Unions."

for the reason that there was no evidence produced with respect to the actual ownership of the plaintiff corporations, and the knowledge of the ownership of the plaintiff corporations was exclusively in the possession of the plaintiffs.

TANNER & CARNEY,
/s/ RICHARD R. CARNEY,
Attorneys for Defendants.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 31, 1958.

[Title of District Court and Cause.]

ORDER EXTENDING TIME IN WHICH TO FILE RECORD ON APPEAL

This matter coming on for hearing upon the application of the appealing defendants for an order extending the time in which to file the record on appeal and docket the cause in the Court of Appeals, and it duly and satisfactorily appearing to the court that the notice of appeal was filed herein on December 30, 1958, and that the time for the filing of the record on appeal has not yet expired and that the testimony has not yet been transcribed by the court reporter and may not be transcribed by the reporter in time for transmission to the Court of Appeals within forty days from said time and the court being fully advised,

It Is Hereby Ordered that the time within which to file and docket the record on appeal in the above entitled cause in the Court of Appeals be and the same hereby is extended to March 30, 1959.

Dated January 19th, 1959.

/s/ WILLIAM G. EAST,
Judge.

This order presented by

/s/ TOLBERT H. McCARROLL,
Of Attorneys for Defendants.

It Is Hereby Stipulated and Agreed by and between the parties hereto through their respective counsel that an order may be entered herein extending the time to file the record on appeal and docket

the cause in the appellate court to and including March 30, 1959.

/s/ JOHN D. MOSSER,
Of Attorneys for Plaintiffs.

/s/ RICHARD R. CARNEY,
Of Attorneys for Defendants.

[Endorsed]: Filed January 19, 1959.

[Title of District Court and Cause.]

ORDER TO TRANSMIT EXHIBITS

This matter coming on for hearing upon the application of the appealing defendants for an order directing the clerk of this court to transmit the original exhibits on file herein to the Court of Appeals as a part of the record in this cause and it duly and satisfactorily appearing to the court that said exhibits are necessary for an understanding of the transcript and record herein and the court being fully advised,

It Is Hereby Ordered that the clerk of this court transmit the original exhibits on file in the above entitle cause to the Court of Appeals for the Ninth Circuit as part of the record on appeal therein.

Dated March 16, 1959.

/s/ WILLIAM G. EAST,
Judge.

Presented by:

/s/ RICHARD R. CARNEY,
Of Attorneys for Defendants.

[Endorsed]: Filed March 16, 1959.

[Title of District Court and Cause.]

DOCKET ENTRIES

1958

Dec. 2—Filed complaint.

2—Issued summons—to marshal.

2—Entered Order referring to Judge East. S.

2—Filed and entered order to show cause—Dec. 3, 1958 at 10:00 a.m. E.

2—Issued subpoena—3 copies—to plaintiffs' attys.

3—Record of hearing on Order to show cause; statements of counsel; evidence adduced; Arguments of counsel, and Entered Order continuing to December 4, 1958, at 9:45 A.M., submitted. E.

4—Filed and Entered Findings of Fact and Conclusions of Law. E.

4—Filed and Entered Interlocutory Injuction. E.

8—Filed Summons—with Marshal's returns.

8—Filed Subpoena—with Marshal's return.

8—Filed Marshal's returns on Order to Show Cause.

15—Filed Transcript of Judge East's Opinion, dated December 4, 1958. E.

22—Filed Answer and Demand for jury trial.

31—Filed Notice of Appeal by defts. Leroy Hein, et al.

31—Filed Bond on Appeal.

31—Filed Statement of Points.

1958

31—Filed Designation of Contents of record on appeal.

1959

Jan. 19—Filed and Entered Order extending time for defts to file and docket appeal to and including March 30, 1959. E.

Mar. 16—Filed and Entered Order to transmit exhibits to C of A. E.

23—Received copy of letter from C of A extending time to April 20, 1959 to docket appeal.

Apr. 13—Filed Reporter's Transcript of Proceedings.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Order to show cause; Findings of fact and conclusions of law; Interlocutory injunction; Notice of appeal; Bond; Statement of points upon which defendants intend to rely upon appeal; Designation of contents of record on appeal; Order extending time in which to file record on appeal; Order to transmit exhibits and Transcript of docket entries constitute the record on appeal from an interlocu-

tory injunction of said court in a cause therein numbered Civil 10101, in which Leroy Hein, Stuart J. Masters, Lawrence Cox, Vincente Otiz, Ray H. Robinson, J. Sloan, Art Coleman and Lew Cornelius are defendants and appellants and Fianza Cia, Nav. S. A. a corporation and Frachten Treuhand GNBH, a corporation are plaintiffs and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellants, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings, together with a transcript of Judge East's Opinion and Exhibits 1 to 5, inclusive, 6-A and B and 7.

I further certify that the cost of filing the notice of appeal, $5.00, has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand affixed the seal of said court in Portland, in said District, this 17th day of April, 1959.

[Seal] R. DE MOTT,
Clerk,

/s/ By THORA LUND,
Deputy.

United States District Court
District of Oregon

Civil No. 10101

FIANZA CIA Nav. S. A., a corporation, and FRACHTEN TREUHAND, G.m.b.h., a corporation, Plaintiffs,

vs.

WILLIAM BENZ, el al; H. A. ROBINSON, et al., RAY H. ROBINSON, et al; J. SLOAN, et al; CARL H. ANDERSON, et al; ARTHUR COLEMAN, et al; MICHAEL E. STEELE, et al; LEW CORNELIUS, et al; WILLIAM BENZ, et al; RALPH DOE 1, et al, Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: Honorable William G. East, U. S. District Judge.

U. S. Courthouse, Portland, Oregon, December 3rd and 4th, 1958.

Appearances: Messrs. John D. Mosser and Robert C. Shoemaker, Jr., Attorneys for Plaintiffs; Messrs. Richard R. Carney and Tolbert H. McCarroll, Attorneys for Defendants as set forth in the following pages. [1]*

(Whereupon the following proceedings were had:)

The Court: The Court will be obliged if appear-

* Page numbers appearing at top of page of Reporter's Transcript of Record.

ances on behalf of the plaintiff will be read into the record.

Mr. Mosser: Plaintiff is ready, your Honor.

The Court: Names of counsel of record?

Mr. Mosser: John D. Mosser and Robert Shoemaker.

The Court: May the Court have the benefit of being advised as to the appearances of the defendants and their respective counsel?

Mr. Carney: Your Honor, I am Richard Carney with Tanner & Carney, with Tolbert H. McCarroll. We are representing those of the defendants who have actually been served. The first defendant named, William Benz, has not been served. Only one member of the Sailors' Union of the Pacific, LeRoy Hein, has been served and he is not an officer. But we do represent him.

The Court: Is he named as a defendant?

Mr. Carney: No. He would be a John Doe, I imagine.

The Court: I see.

Mr. Carney: H. A. Robinson has not been served and no officers of the Marine Cooks and Stewards have been served.

Ray H. Robinson who is the agent for the Marine Engineers Beneficial Association, Local 41, has been served and we do represent Mr. Robinson.

J. Sloan has been served and we represent [2] him. Carl H. Anderson, Ernest E. Baker, and so on, of the Longshoremen's Union, my understanding is that they have not been served.

Arthur Coleman, whose true name is Art Coleman, has been served and we represent him.

Michael E. Steele has not been served. Lew Cornelius, who is the Secretary-Treasurer of Local 162 of the Teamsters' Union, has been served and we do represent him.

William Benz, again, has not been served nor have any officers of the Seafarers' International Union. But we are making no appearance on their behalf.

Neither has anyone been served for the National Maritime Union, and so we are making no appearance for that defendant.

Mr. Mosser: At this point I think it would be appropriate: After drawing this complaint yesterday I found information which leads me to believe that the International Longshoremen's & Warehousemen's Union have not been a part of this conspiracy and so they were not served. I would move to dismiss as against Carl H. Anderson, Ernest E. Baker and William Does who are named in the complaint as representatives of that union and its membership.

The Court: Your motion will be granted.

Mr. Moser: May I ask counsel one question? I was informed that the Marshal had also served some pickets down [3] at the dock. Are you representing them?

Mr. Carney: Yes. Yes, that's true. Of course, they are John Does as far as the pleadings are concerned, but their true names are Stuart J. Masters——

The Court: I wonder, for the sake of the record would you identify them with which one of the groups of defendants named as the unions?

Mr. Carney: Well, these—all three of them are members of the Marine Cooks and Stewards Union, which is the second union which is——

The Court: So that would be probably James Doe 1, James Doe 2 and James Doe 3?

Mr. Carney: Yes, I imagine.

The Court: And their true names, sir?

Mr. Carney: Stuart J. Masters, Lawrence Cox, and the third name is Vincente Otiz, O-t-i-z (spelling). They are members of that union but they are not officers.

The Court: I understand. Mr. Carney, I don't know if this is a fair question to ask or not, and I want counsel to understand that the Court makes no particular issue about it one way or the other. Do I understand, for example, the officers of the Sailors' Union of the Pacific, do they voluntarily submit or do they——

Mr. Carney: They do not voluntarily submit.

The Court: Thank you. The officers of the Marine Cooks [4] and Stewards Union, do they voluntarily submit or do they wish to——

Mr. Carney: No. They do not voluntarily submit.

The Court: Thank you. Now, apparently there has been no officer or any member of the Joint Council of Teamsters 37 served.

Mr. Carney: Well, Lew Cornelius is the Secretary-Treasurer of the Joint Council No. 37 and he is also the Secretary-Treasurer of Teamsters Local No. 162. So, he is the same person. So, to that extent——

The Court: Well, I will call him Ed Roe 1 of the Joint Council of Teamsters, then.

Mr. Carney: Yes.

The Court: Then, I take it that no officer or member of the Seafarers' International Union voluntarily submits.

Mr. Carney: That's correct.

The Court: Thank you. As well as two members of the National Maritime Union?

Mr. Carney: Yes. That's right.

The Court: Thank you.

Now, what is the plaintiffs' position in the matter? Do you wish to proceed against those who have been served?

Mr. Mosser: It would be our wish, your Honor, to proceed against those who have been served, understanding that an injunction would not bind anybody who was not before the Court; [5] though, leaving it open to not dismissing the case against those people but leaving it open to serve them later on should it prove desirable.

The Court: That would be your privilege.

Does counsel for the plaintiff desire to make an opening statement?

Mr. Mosser: I will make a brief statement, your Honor, because I think some background to this might be helpful. Of course, much will depend upon the facts as they come out.

But there have been certain cases very similar to this that I think your Honor might not be fully familiar with, perhaps he is. Three of them were in this jurisdiction, the District, arising in 1952

and concerning the vessel Riviera. Those cases were handled by Judge Solomon. They differed slightly from this in that the dispute arose with part of the crew of the vessel going on strike.

The Judge decided the strike was unfounded and thereafter the Sailors' Union of the Pacific took up picketing for the crew. The Judge enjoined the Sailors' Union of the Pacific and then the Masters, Mates and Pilots took up picketing of the vessel, they claiming that they wanted to place their own men aboard and were not interested in the crew. But the Judge actually found that they were backing up the SUP's picketing for the crew and enjoined them also.

Then the Seafarers' International Union, [6] Atlantic and Gulf District, came into the picture, picketing the vessel and claiming that they were not interested in the crew, they didn't want to put their own members aboard, all they were interested in was raising wage rates aboard the vessel so that they would be comparable to and competitive with those on vessels with which their members had contracts and were employed.

The Judge again found that the picketing of that union was to back up the SUP and MMP in their previous efforts on behalf of the crew and and enjoined them.

Now, I think in all of these cases the defendants were maintaining that this was a labor dispute; that the Court had no jurisdiction because jurisdiction should be in the National Labor Relations Board; if any unfair labor practices were involved

that Taft-Hartley had pre-empted the field and that the Norris-LaGuardia Act prevented the District Court from having jurisdiction to enter an injunction.

Despite those claims the Court did, as I have said, grant the injunctions in all three cases and, I believe, Judge Solomon in the final opinion he gave summarized briefly his feelings as follows:

"In the previous decisions involving the Riviera cases I pointed out that these cases involved a foreign corporation owning a foreign vessel registered under a foreign flag and that [7] the officers and crews were all foreign nationals. I believe I also indicated that merely because a foreign vessel calls at an American port does not entitle an American union to picket the vessel nor does it require the owner to hire American seamen nor does it enable to the American union to require the vessel to pay its foreign officers and crews wages comparable to those paid to American officers and crews.

In the last case I indicated that the problem of the sale of American-built vessels to foreign nationals who registered the ship under foreign flags was a problem for the Executive and Legislative branches of the Government and was not a problem for the Courts.

Whatever injustices may result, it is not for the Courts to try to solve it."

There were appeals taken from those injunctions to the Ninth Circuit Court of Appeals and those appeals were dismissed, the cases came back here for hearing on damages.

Judge Solomon awarded damages. The Court of Appeals affirmed, and the Supreme Court of the United States granted certiorari.

In the opinion for the Court Mr. Justice Clark——

The Court: Just for my notes, would you give me the citation of that? [8]

Mr. Mosser: It is in 1 Lawyers Edition 2d—do you have the page number of that?

Mr. Carney: No. I have the 87 Supreme Court Reporter, 699 and the—I think I have the U. S.

The Court: Do you have the U. S. Report?

Mr. Carney: 353 U. S., 138.

The Court: Thank you. Of course that went forward purely upon the Oregon law.

Mr. Mosser: Well, the question that was raised and decided in the Supreme Court was whether the Taft-Hartley had pre-empted the field which was the defense that they were still arguing; that this Court had never had jurisdiction of the matter because of the Taft-Hartley.

Reading just two brief excerpts from the opinion of the Supreme Court:

"While the petitioners in this diversity case present several questions, the sole one decided is whether the Labor Management Relations Act of 1947 applies to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port. We decide that it does not."

And their concluding statement of the Court's opinion was this:

"For us to run interference in such a [9] delicate field of international relations there must be present the affirmative intention of Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.

We, therefore, conclude that any such appeal should be directed to Congress rather than to the Courts."

The Court: Anticipating what may be the position of the defendants in this matter which, I would assume, would be the same as in the New York case——

Mr. Mosser: I don't know what their position would be. In all of the cases that I have handled, your Honor, they have argued that Taft-Hartley and Norris-LaGuardia has deprived the Court of jurisdiction where there is a labor dispute to enter an injunction and that the picketing involved in these cases involves a labor dispute.

Now, there is one more case that arose in the Court of Tacoma. It was brought before Judge Boldt in which—this was in July or August of 1957. In that case, as in this, a protest was made. A little picket boat went out and circled around a Liberian flag vessel of Panamanian corporate ownership, saying, "Picket boat. Unfair to American seamen. [10] We protest the loss of our jobs to foreign vessels." The suit was brought very similar

to this. The unions themselves were the parties defendant. Practically all of the unions except the Teamsters, I think, that are involved in this case were sued there.

Judge Boldt found, however, that the picketing was being conducted by the Marine Cooks and Stewards and the injunction which he entered ran solely against them.

Now, again, over the same type of arguments which had been made in all these cases concerning Norris-LaGuardia and Taft-Hartley the Court did enter an injunction and, again, the Court emphasized that the problem here was an economic dispute that was trying to overturn our national policy as reflected in treaties and free trade agreements, and so on, and that if these men wanted an appeal it should be to Congress and the Executive which have fashioned those laws and treaties rather than to the Courts.

The Court: Well, in either the Riviera cases before Judge Solomon or this case before Judge Boldt was there a contention made that the true owners were American interests?

Mr. Mosser: No, there was not, your Honor. There was some questioning in that regard in the Tacoma case, but no evidence to establish such ownership.

The Court: I see.

Mr. Mosser: Now, there is one case that your Honor may [11] have heard of and it may have been the precedent for the decision that was

reached in New York last Saturday in a proceeding very similar to this, contrary to the cases I have cited. The Peninsular & Occidental Company had a ship running between, I think it was, Cuba and Florida. It applied for a subsidy from the Federal Government for that run and it didn't get it. So then it formed three Liberian corporations and it sold the vessel to one of them and through elaborate chartering arrangements chartered it and continued it in the same run.

Now, even though they had this fiction of the Liberian corporate ownership the officers of Peninsular & Occidental were the officers of these Liberian corporations.

Peninsular & Occidental which reserved the right, I believe, to hire the master and to hire any other member of the crew, the vessel continued to employ many American—United States citizens as seamen. It engaged in this regular run back and forth between a United States port and Cuba. It submitted to U. S. Coast Guard jurisdiction and inspections.

Well, the National Labor Relations Board ordered an election in that case, saying, "This is an American employer" and, I think, quite properly so.

Mr. Carney: Do you have the citation on that, Mr. Mosser?

Mr. Mosser: I have a copy of the decision here which I would be glad to show to counsel and the Court. I only have [12] one. And I could have more photostats of it made.

Mr. Carney: We can get it later.

Mr. Mosser: But I have the test of the NLRB decision.

Now, there is plenty of precedent, I think, for the action of the Supreme Court, Judge Solomon, and Judge Boldt, in these cases. It's not a question of whether Congress could make these ships subject to our labor laws. It is just that they hold that there has been no intention to——

The Court: I understand.

Mr. Mosser: ——and that obviously you have got delicate international relations here where, if we are going to require the employers of foreign shipping to meet our standards, they may boycott our ships in their ports.

It is also not just a problem of the runaway flags, because if the unions have the power to picket a liberian flagship because its wage rates or tax policies or anything else are below those, or different from those of the United States, it has that same right regarding the ships of Japan or Honduras or Great Britain or Norway or any country that has policies that they don't like.

While wage rates may be lower on some foreign countries than others, all of them are substantially below most of the United States, so that the same argument could justify picketing every foreign ship that came into American [13] ports.

I think that that is enough background, your Honor, for the type of law that is involved in this dispute.

The Court: I think I understand your position.

Mr. Carney: If it please the Court, Mr. Mosser

and I together went through the Riviera case from Judge Solomon's Court all the way to the Supreme Court and I don't think we will disagree very much as to what the holdings were in that case. But I do think we will disagree a great deal as to how that case will apply to the facts in this case.

Before we get into the Riviera case I would like to call the Court's attention to some matters that I think the Court ought to consider right at the very outset of this case. That is with respect to the Court's jurisdiction in the matter. Now, I am not referring merely to the jurisdictional question which is raised by the Norris-LaGuardia Act; that is, the jurisdiction of the Court to issue an injunction in labor disputes, but I am referring more particularly to the jurisdiction of the Court over the subject matter of the proceeding and over the parties.

Now, of course, the Court has jurisdiction over the parties who are served but I mean that it isn't clear to me from this pleading, complaint, which is filed in this case, upon what the theory of the plaintiff is in coming to the—to this Federal Court. [14]

In the case we find language on Page 4 and 5, I believe — at the bottom of Page 4 in Paragraph XIV and at the top of Page 5 where that paragraph concludes—that speaks of diversity of citizenship. In other places in the case we find language that suggests—I am referring now to Page 7 of the complaint and Paragraph XXI. It refers to language of unfair competition or restraint of trade which sounds in language of the Sherman Act.

In other places and in that same paragraph, indeed, there is language with respect to the purposes of picketing is to have persons who have contracts with the plaintiffs not to carry out those contracts; more particularly, in Paragraph XXXII which sounds in language of the secondary boycott as that is defined in the Taft-Hartley Act.

Now, I think that it would be proper for the Court before proceeding at all to call upon the plaintiffs to tell us what is their theory, how do they feel that they are before this Court. Are they here under a Federal statute? Are they here because of diversity of citizenship in order to enforce some state law or some wrongful conduct as defined by the state law, either common law or statute? How are they before the Court?

I think we should know that first and then proceed from there. Because, I think it will make a lot of difference. I think that it may even shorten the matter considerably. [15]

But I think we should know that and I think it will narrow our ground of inquiry and we won't be going all over the place with respect to these other acts that might or might not be involved.

So, I would suggest that counsel for the plaintiff first tell us what his theory is with respect to the jurisdiction of this Court and then I would be ready to make an opening statement with respect to our position in the matter.

The Court: Well, I don't believe that any one of these theories of jurisdiction that are set forth in the complaint—and we are speaking other than and

different as to the Court's jurisdiction being restricted by the Acts of Congress in labor matters—that is, just general jurisdiction of the subject matter — I don't believe that any of their theories as taken from their complaint, whether it be under diversity or the secondary boycott under the statute of an Act of Congress and what other grounds they may have are inconsistent. They may assert as many grounds for jurisdiction as they desire. They may stand or fall on one or more or none. So, I don't believe that the Court is in a position to order them to elect.

But in line with getting about our chore at hand I might ask counsel if they are in a position to assert any particular grounds for general jurisdiction that they claim.

Mr. Mosser: Well, your Honor, I think that primarily [16] we are relying on common law restraint of trade, the unlawful nature of a boycott in restraint of trade at common law.

Now, it may be that this case falls under the Sherman Act. I haven't myself satisfied myself that the Sherman Act applies to this situation. I think clearly this is the type of conduct the Sherman Act is talking about and the public policy that the United States has declared against. But in view of the foreign nature here I am not entirely sure that we come under that Act. And I am reserving the right at any time to plead a Sherman Act—I think all that would be necessary would be to ask for treble damages and attorneys' fees instead of single damages if this is applicable there.

On the Taft-Hartley Act, I am saying this is not a secondary boycott within the meaning of that Act.

The Court: I see.

Mr. Mosser: It is that type of conduct. But the Taft-Hartley Act doesn't apply, as the Supreme Court has held, to this situation.

The Court: Well, you will have to stand or fall on your proof.

Mr. Carney: I would like to be heard further, then, your Honor.

The Court: Yes.

Mr. Carney: I think we should make one thing quite clear with respect to what occurred in the Riviera case as [17] distinguished from this case, both in what occurred in the courts and factually what their holdings were based upon. In the Riviera case we came into court at the outset, as we are in this case, where the plaintiff, who is a shipowner, asked for a preliminary injunction to restrain the picketing of the vessel.

In that case Judge Solomon granted their temporary relief. We then appealed from that temporary injunction to the Court of Appeals. It's an appealable order because of provisions in the Norris-LaGuardia Act.

When the case was on appeal to the Court of Appeals it was dismissed but it was not dismissed on the merits.

Now, Mr. Mosser did not make that clear. It was dismissed because of mootness. In other words, after we had our appeal in the Court of Appeals the ship

left the Port of Portland and he moved to dismiss it on the ground of mootness.

The Court: I see.

Mr. Carney: So, the Court of Appeals never decided the correctness or incorrectness of the ruling of Judge Solomon with respect to the granting of the temporary injunction.

Then we came back in that case and went on with the action for damages. And the Court allowed damages. In that case it was the theory of the Court that damages were allowable because the picketing was for an unlawful purpose [18] as defined in the state law. The unlawful purpose that the Court found was the action by the unions who were doing the picketing in attempting to force the shipowner to re-employ his former crew members who went on strike when they were under Articles. The Court held that that was an unlawful purpose to try to require a shipowner to rehire a crew that had deserted or had left the ship illegally. That was the unlawful purpose. Based upon that the Court allowed damages.

We appealed the matter first, of course, to the Court of Appeals. It is very important in considering this matter that is before the Court now with respect to an injunction to understand clearly that the Court of Appeals in deciding that case on appeal from the damages judgment did not consider at all the effect of an injunction or the effect of the Norris-LaGuardia Act.

Now, I have before me the Court of Appeals decision in which Justice Murphy wrote the opinion. He

is a District Judge who was sitting temporarily on the Court of Appeals. He said:

"The district court's jurisdiction is attacked first by reason of the Norris-LaGuardia Act provisions against injunctions and labor disputes. The appeals before us, however, have nothing to do with the injunction issued by the district court in the previous litigation between the parties at bar. [19] The Norris-LaGuardia Act is not involved in these cases and is not discussed further."

So, the Court made it very clear that they were not going to discuss or determine anything with respect to the power or lack of power of a court with respect to injunctive relief.

Then when the case went to the Supreme Court of the United States the only question we raised there was the question of pre-emption and the Court held that the National Labor Relations Act or the Board would not have jurisdiction of this case because it involved the internal workings aboard a foreign ship.

Now, I think the thing that is very important for the Court to determine and to see at the outset is with respect to the effect of the Norris-LaGuardia Act in this proceeding.

I received early this morning from New York a copy of Judge Frederick Bryan's decision. It is a 36-page decision. I have had a chance only to read it once. But I think I can tell the Court this: that that case, of course, as compared to the case that is before this Court is exactly the same on the facts.

It is exactly the same protest in New York as is being carried out here in Portland and in other ports.

In other words, what occurred in New York was this: The various unions who are affiliated with the ITF [20] published the fact that they were going to carry on a protest against the Liberian and various other flagships from December 1st, I think, until December 4th, a period of four days. When that was announced the shipowner promptly went into court before any protest banners or picketing or anything ever occurred and sought from the Court a decree enjoining it.

The Seafarers' International Union and the National Maritime Union voluntarily appeared in the case. They had a hearing on the matter and the Court entered its judgment—or, its order denying injunctive relief.

Now, in that case in New York as in this case here, practically the same or almost identically the same contentions were raised. They raised the question with respect — of the effect of the Sherman Antitrust Act in restraint of trade and with respect to that the Court decided that it was not applicable because what was being carried on here was simply conduct by a union in order to enhance its own union objectives.

This Court may remember the case which we tried before you involving the shuffleboards.

The Court: I recall.

Mr. Carney: That case was a case based on the Sherman Act. This Court wrote an opinion after

reading the precise language in the agreement that was tendered to the shuffleboard [21] operator and found that there were provisions in that agreement in restraint of trade. The Court will probably remember the leading case of—the Alan Bradley case vs. the Electrical Workers, which held that a union can be in violation of the Sherman Antitrust Act if the union conspires with one employer or employers to the detriment and the restraint of trade of the other employers. That was the finding of this Court in that American Shuffleboard Company case.

But in this case in New York Judge Bryan discussed the Alan Bradley case and made it abundantly clear that the protest that has been carried on here is solely for the benefit of the seamen who are carrying it on; they are not in conspiracy with any other employer and that therefore the provisions of that Act are not applicable.

He also based—the main basis of the opinion—and I'd be happy to let the Court read it, and I know the Court will want to, although I only have the one copy—the basis of the opinion was based on the Norris-LaGuardia Act. The Court traced the history of the act through the Sherman Act and through the Clayton Act and found that the conduct being carried on here was pursuant to labor dispute and that therefore the Court did not have jurisdiction to enter an injunction.

The Court said with respect to the Taft-Hartley Act, which we aren't, probably, concerned with here because, [22] apparently, the plaintiffs are not contending that it is involved, the Court said that if

they are contending that it is involved that a long line of cases have held that the only way you can get injunctive relief——

The Court: Is through the Board.

Mr. Carney: ——is through the Board. So that was the gist, as I read it this morning, of the decision in New York.

Now, I think, however, your Honor, that if it is the theory of the plaintiffs that they are before this Court on a common law restraint of trade, that to me would be an action based under common law or state law and that they are in this Court or attempting to go before this Court on a ground of diversity of citizenship.

I submit to the Court that under the proceedings —or under the statute and the cases on diversity of citizenship and, particularly, the amended statute in 1958, that it does not appear on the face of their complaint that they have alleged facts sufficient to bring them within the Acts.

In other words, there are two reasons for that: In the first place, the amount in controversy now must be ten thousand dollars. The amount that they are claiming is fifteen hundred dollars a day. And I think it is pretty well understood that this protest is only to last for four days and that will be only six thousand dollars. There is not a sufficient amount in controversy to incur the jurisdiction [23] of this Court.

There is a second reason with respect to citizenship. The citizenship in this case is this: that the plaintiffs are a Panamanian corporation and a Ger-

man corporation. So there are citizens of Germany and of Panama. The defendants in this case are a large number of international — of unincorporated associations which are unions. We are ready to show that the law in determining diversity, that it must— that they would have to be no member of any of those unions who would be either a citizen of Panama or of Germany because there would not be diversity if there would be any one citizen of Germany a member of any of those associations. And I have the cases on that.

There is no diversity if there is the same nationality on each side of plaintiff and defendant. For two reasons, therefore, your Honor: There is no diversity in this case shown on the face of the complaint; they have not alleged facts with respect to the statutory amount.

Now, we can proceed. But I would think that the Court would want to hear testimony on that matter first, because if they do have diversity here I cannot see how they can proceed further.

The Court: Thank you for your advice. I would suggest that the plaintiff put on a prima facie case showing jurisdiction on the basis of their claim by calling—— [24]

Mr. Mosser: I would just like to point out and ask Mr. Carney if he is really contending what he says with regard to diversity jurisdiction. This is a class procedure that is employed here. I will ask Mr. Carney if he won't admit that one of the questions that was involved and, I think, decided in the Riviera cases was that for diversity purposes where

you sue individuals as representatives the only citizenship that is relevant is the citizenship of those representatives.

Mr. Carney: No. That was not raised in the Riviera case.

Mr. Mosser: Well, I have your brief here.

Mr. Carney: We admitted diversity in the Riviera case.

The Court: Well, there is no concession. You will have to go forward.

Mr. Mosser: Mr. Carney, will you concede that the citizenship of the defendants who have been served is diverse from that of the plaintiffs?

Mr. Carney: Yes. The defendants that have been served, the individual people who have been served are all residents of the State of Oregon and, therefore, they are diverse to the others. I will admit that.

Mr. Mosser: Do you just wish a prima facie showing on diversity or on the case itself, your Honor?

The Court: On the case itself. As far as the record [25] shows I don't know if there is any picketing going on or——

Mr. Mosser: We will call, I think it was, Stuart J. Masters.

STUART J. MASTERS

produced as a witness in behalf of the Plaintiffs, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Mosser): Mr. Masters, are you a local resident of Portland? A. I am.

Q. What is your address?

A. 22 Northwest 17th Avenue.

Q. Are you a seaman by trade? A. I am.

Q. Are you serving in the steward's department or the deck crew? A. Right.

Q. Steward's or both?

A. Well, I am a steward and cook, yeah.

Q. Are you a member of the Marine Cooks and Stewards Union? A. I am.

Q. At any time since the morning of December 1st—that [26] was Monday—have you been engaged in picketing the vessel Capetan Yemelos at Irving Dock in this city?

A. I don't believe I would term it picketing. I was protesting the ship.

Q. You were walking around in the vicinity of the ship wearing some sort of a placard stating your protest? A. That is true.

Q. Were you also handing out some leaflets?

A. I was.

Mr. Mosser: I will ask the bailiff to mark these Exhibits 1, 2 and 3.

(At this point a document purporting to be a pamphlet was marked for identification as

(Testimony of Stuart J. Masters.)

Plaintiffs' Exhibit 1; a document purporting to be a pamphlet was marked for identification as Plaintiffs' Exhibit 2; and a document purporting to be a leaflet was marked for identification as Plaintiffs' Exhibit 3.)

The Court: Would you give me the name of the vessel again?

Mr. Mosser: Capetan, C-a-p-e-t-a-n Yemelos. I am not sure of the pronunciation. Y-e-m-e-l-o-s (spelling).

The Court: She is owned by which one of the plaintiffs?

Mr. Mosser: The first one, Fianza. [27]

The Court: Thank you. The Fianza would be the Liberian?

Mr. Mosser: The Panamanian corporation.

The Court: Panamanian.

Q. (By Mr. Mosser): I will ask you now, Mr. Masters, if you were distributing documents such as those shown you there as Plaintiffs' Exhibit 1, 2 and 3?

A. No; I have never seen these two. I was distributing these (indicating).

Q. You were distributing that one? A. Yes.

Q. Can you say which one? That is marked down in the lower part there. Was it marked?

A. 1010——

Q. Plaintiffs' Exhibit No. 1?

A. No. 1 that is.

Q. No. 1. But you were distributing that. But

(Testimony of Stuart J. Masters.)

to your knowledge you weren't distributing 2 or 3; is that correct?

A. No; I have never seen these before (indicating).

Q. Now, what caused you to go down to the docks to distribute these leaflets?

A. Well, we heard about—it was in The Oregonian—that there was a movement on in New York to start picketing Saturday night. So I felt it was our duty to do a little something out here. I asked Larry Cox to go with me.

Q. As part of your union protest against the ships; is that [28] correct?

A. I suppose you would call it that, yes.

Q. Do you have a union paper at all in your union? A. Yes. We have one printed.

Q. Is that the Stewards News?

A. Yes; Stewards News.

Q. Do you get that paper regularly?

A. Yes; it's in the hall for——

Mr. Mosser: I will ask that this issue of November 28th, 1958, be marked as an exhibit.

The Court: It will be 4, I believe.

(At this point a document purporting to be a newspaper dated November 28, 1958, was marked for identification as Plaintiffs' Exhibit 4.)

Q. (By Mr. Mosser): I will ask you, Mr. Masters, if you happen to have seen that copy of the union paper. A. No, I haven't.

(Testimony of Stuart J. Masters.)

Q. That is the union newspaper, is it not, to your knowledge?

A. That is, or a good copy of it.

Q. Now, what time did you go down to this particular ship?

A. It was at 7:30, I believe, in the morning.

Q. Was that Monday morning or yesterday?

A. That was Monday morning.

Q. Were there other persons? I think you mentioned Lawrence Cox. [29] Was he with you at that time? A. He was.

Q. Was he also wearing a banner similar to yours? A. That is true. Uh-huh.

Q. Was he passing out any of this literature?

A. Yes.

Q. Were you picketing there continuously from that time on or did other people relieve you from time to time?

A. No; we were relieved at 8:00 — about 8:00 o'clock.

Q. 8:00 o'clock yesterday morning — Monday morning? A. Uh-huh.

Q. Did you go back and picket at all after that time?

A. Yes. And I went back—then I went back, oh, let's see, I think it was at 6:00 o'clock that night.

Q. How long did you stay that time?

A. I stayed until 12:00.

Q. Did other people relieve you at that time and start picketing in your place?

A. That's right. Uh-huh.

(Testimony of Stuart J. Masters.)

Q. Did you go back at all after midnight Monday night?

A. Yes; I picketed yesterday there.

Q. What were the hours when you were picketing there yesterday? A. 12:00 to 6:00.

Q. Was it a regular shift 12:00 to 6:00? [30]

A. Yeah. Yeah.

Q. Do you know who the other people were who were picketing who relieved you in between your shift? A. No; I don't know them.

Q. Are they members of your union?

A. They—no. They wasn't members, they was just Cox and I and Otiz there.

Q. Well, were they the ones that were relieving you or were they picketing on the same 12:00 to 6:00 shift that you had?

A. There was other men, but I don't know who they were.

Q. What I am asking is, were Mr. Cox and Mr. Otiz—— A. They were with me.

Q. They were with you on the same shift?

A. On the same shift.

Q. Where did you get these banners that you were wearing? A. Had them made.

Q. You had them made? A. Uh-huh.

Q. Where did you order them made?

A. Well, had them made down on Second.

Q. You had them made on Second?

A. Here in Portland. I don't know just where they were, but they were given to me.

Q. Who gave them to you?

(Testimony of Stuart J. Masters.)

A. Well, this was — a member of the Marine Club. [31]

Q. You got them from a member of the Marine Cooks and Stewards? Have you been in the Union Hall at all lately?

A. Yes; I have been in the hall.

Q. Is this protest a matter of common discussion in the Union Hall? A. I would say so.

Mr. Mosser: I think that's all the questions I have.

Cross Examination

Q. (By Mr. Carney): How long have you been going to sea, Mr. Masters?

A. About sixteen—fifteen, sixteen years.

Q. And have you shipped out of the Port of Portland most of that time?

A. Yes; most of the time.

Q. Have you shipped as a cook or a steward aboard vessels carrying cargoes of grain?

A. Oh, yes.

Q. Have you done that a number of times?

A. Oh, yes.

Q. Are there many jobs like that available at the present time?

A. Not as many as we usually have.

Q. There used to be quite a few grain runs?

A. Yes. [32]

Q. Have you observed in Portland what type of ship it is that are carrying the cargoes of grain from here now?

(Testimony of Stuart J. Masters.)

A. Yes; we have observed that.

Q. What kind of ships are they with respect to nationality?

A. Well, they're all under foreign flags or what we would term the runaway flags.

Q. The runaway flags means flags of Liberia and Panama and those places?

A. Panamanian and Honduras.

Q. On the American ships on which you sail does your union have an agreement with the American companies covering your wages and working conditions? A. Oh, yes. Sure.

Q. In other words, every ship that you work on there is an agreement between a union and the company governing your conditions?

A. Oh, yes.

Q. Is the pay that you are receiving aboard American ships substantially greater than those on these runaway flagships?

A. I presume they are.

The Court: I wonder if, for the sake of the record, we could have described what counsel and the witness have in mind when they say a runaway flagship?

Mr. Carney: I think we could probably stipulate to that, your Honor. I think it is a phrase. The words "runaway flag" [33] and "flags of nenecessity" or "flags of convenience," all of those terms have been applied by American unions to the Liberian flag and to the flag of Panama and to the flag of Costa Rica and other such countries,

(Testimony of Stuart J. Masters.)

which describe ships which are registered in those countries and, therefore, carry those flags; whereas, in truth and fact the ships are not owned by residents or corporations of Liberia or of Panama, but are merely registered there for tax purposes or for other economic reasons.

The Court: In other words, they are truly American bottoms?

Mr. Carney: They are either truly American bottoms or some other nationality.

The Court: Right. Is that statement acceptable to the plaintiff?

Mr. Mosser: I think so. I want to be sure that the last point was made that these are not necessarily American ships. In fact, this one is not an American — ultimate American-controlled ship that we are dealing with here. The Capetan Yemelos is a Greek crew with an ultimate Greek owner. It's a common thing, I think, for shipowners of many nations. I have seen figures in the papers. That's all I know. Forty-two per cent of these foreign—for convenience flag or necessity flagships are ultimately American-owned. That would mean 58 per cent were ultimately owned by nationals of some other country. [34]

The Court: Yes. Well, I think we are all quite in agreement that the Court's statement that in truth and fact that these were American bottoms has reference only to, as pointed out by Mr. Carney, that they are not in truth and fact owned by nationals of the country whose flags these various ships fly.

(Testimony of Stuart J. Masters.)

Mr. Mosser: I think that is a correct statement.

Q. (By Mr. Carney): Have you observed with respect to being able to find jobs that jobs have become more scarce for American seamen since the number of these foreign flagships have appeared?

A. Oh, yes. Jobs are far more scarce now than what they were.

Q. Was it because of the scarcity of jobs that has been created by these foreign flagships one of the reasons for this protest that you are carrying on? A. I believe so. Yes.

Q. Was another reason for your protest that these foreign operators are operating at such low wage scales that it might tend to bring down the wage scale that you have under your union contract? A. That's true.

Q. Now, you went out and wore the banner and carried out your protest by walking by this particular ship, the Capetan Yemelos, is that right?

A. That's right. [35]

Q. Did you have any conversations with longshoremen or any of the longshoremen's unions?

A. No. No, sir.

Q. Did you ask any of those longshoremen not to work the ship or anything like that?

A. Oh, no; nothing like that. We didn't consider this a banner—a strike banner. This was just purely a protest.

Q. So, as far as you know, you didn't yourself and you don't know of any relationship between your union and the Longshoremen's Union?

(Testimony of Stuart J. Masters.)

A. No. I know nothing about that.

Mr. Carney: That's all.

The Court: For the sake of the record, can we reach a stipulation as to what the wording of the banner was?

Mr. Mosser: Yes. There is a newspaper photograph which — as much of it as I could read, I quoted in the complaint. Could you agree that that which is quoted in the complaint is the text of the banner?

Mr. Carney: I think that we can say that the banner said the following: "Runaway flagships threaten American merchant marine, national security. Protest against the SS" and then the name of the ship. Then what does it say about American —American Committee of the ITF. We can stipulate that ITF [36] means International Transport Workers Federation.

The Court: All right.

Mr. Mosser: I wonder, to clear the—I think that's all the questions I have for this witness, your Honor.

(Witness excused.)

Mr. Mosser: I wonder if we could clear the record, too, a little by stipulations as to the nature of the ITF and these other unions? I will ask Mr. Carney if he would stipulate that the International Transport Workers Federation is a Federation of Unions—not a member—but of unions representing the transport trade unions of many nations and that included in it are the Teamsters Union of the

United States, International Brotherhood of Teamsters, and is included the National Maritime Union and the Seafarers' International Union. And that the Seafarers' International Union in turn is composed of several departments, one which is the Atlantic and Gulf District of the SIU, another of which is the Sailors' Union of the Pacific, another, the Marine Cooks and Stewards, another, the Marine Firemen, Oilers and Wipers, another, the Great Lakes District of the SIU, and another the Canadian District of the SIU and, finally, I believe, the Masters, Mates and Pilots are affiliated if not a part with the SIU.

Mr. Carney: Well, I can stipulate to most of that. With respect to the ITF, I cannot stipulate whether or not they [37] actually have members that belong to the union itself who are workmen as distinguished from only unions belonging to it. I don't know, frankly. I know there is such an organization as the ITF.

It was my understanding that they had members of their own also who were actually seafaring people and involved in longshoring work and other types of work, and that those unions are federated together with a number of international unions.

Now, with respect to the Seafarers' International Union, it is an international union which is composed of a number of autonomous unions, one of which is the Sailors' Union of the Pacific, another of which is the Marine Firemen's Union, and Masters, Mates and Pilots Union is affiliated with them, and various other unions of the American unions.

I don't know how that—that would be as far as I could go.

Mr. Mosser: That the Marine Cooks and Stewards——

Mr. Carney: Marine Cooks and Stewards Union is an independent union which is affiliated with the Seafarers' International Union.

Mr. Mosser: And the International Brotherhood of Teamsters which the local and council served are affiliated are also a part of the International Transport Workers Federation.

Mr. Carney: I can't say that for a certainty. I can say that the Local 162 of the Teamsters Union is a local union. [38] Joint Council No. 37 is a, you might call it, a federation of various local unions in Oregon. They are all affiliated with the International Brotherhood of Teamsters which is an international union. It is my understanding that whether they are actually affiliated with—they are at least cooperating with the ITF.

Mr. Mosser: Specifically will you admit that there is this general nationwide pattern of this boycott at this time under the ITF sponsorship?

Mr. Carney: I will not use the word "boycott." It is a protest. It's a protest. There is a difference.

Now, we are willing to stipulate that there is a national program of making a four-day protest against what the unions call runaway flags and that protest is to be carried out by a banner being displayed by a person, call him a picket if you like, near the ship. But it is not a matter of picketing

and it is not a matter of boycotting in the usual union sense of the word.

The Court: Does that clarify your position, Mr. Mosser?

Mr. Mosser: I think so, your Honor.

The Court: May I inquire to shorten this, can counsel stipulate for the record whether or not workage of this particular vessel has been stopped by reason of the individual carrying the banner?

Mr. Carney: No, we cannot stipulate to that because we [39] can't stipulate that it is stopped by reason of it.

Mr. Mosser: Will you agree that it stopped simultaneously with the——

Mr. Carney: No. You will have to put on your longshoremen with respect to that.

Your Honor, we are charged here with conspiracy with the longshoremen which we emphatically denied.

Mr. Mosser: You were not charged with that conspiracy. I stated at the opening of this hearing that my later information was that they had not participated.

The Court: I think maybe you had better go to your proof on that. Let's take a ten-minute recess here.

Mr. Mosser: All right, your Honor.

(Recess taken.)

The Court: Plaintiffs' next witness.

Mr. Mosser: I will call the vessel's chief officer, Alexandro Apostolatos. [40]

ALEXANDROS APOSTOLATOS

produced as a witness in behalf of the Plaintiffs, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Mosser): Are you the Chief Officer aboard the vessel Capetan Yemelos?

A. Yes, sir.

Q. Is that in this port at the present time?

A. Yes, sir.

Q. At the Irving Dock? A. Yes, sir.

Q. When did the vessel arrive there?

A. On the 13th of December, 2:45.

Q. And you had come down from Longview, is that right? A. From Longview.

Q. That was your last stop formerly? Were you to load any cargo here at Portland?

A. Yeah. We are supposed to load barley for Germany.

Q. A cargo of barley for Germany?

A. Yes, sir.

Q. And did you come here in ballast?

A. In ballast.

Q. Now, did you actually load any of that cargo?

A. No, we didn't. [41]

Q. Did you make any preparations for loading it?

A. Oh, yes. After we finished shifting boards in Longview we came here to—started loading Monday on the 1st of December. So, 7:00 o'clock in the morning they still came on board to make the prepa-

(Testimony of Alexandros Apostolatos.)

ration for the start of loading and everything was fixed until 8:30 Hugh came back and advised me that they are no going to start loading because the ship has been picketed, we had to move the ship.

Q. Were you then requested to move the ship?

A. To move the ship at 11:00 o'clock because Japanese ship had to take on our place.

Q. Did you move the ship?

A. No. I came back aboard the ship, I advised the chief engineer to have the engines ready. Everything was ready at 11:00 o'clock. But the time was past up to 11:30. So nobody was appear, no pilot. I went back there in the dock in the office and asked them what happens, so he told me.

Mr. Carney: Now, just a moment. I object to what someone on the dock told him, your Honor, as hearsay.

The Court: I will receive this evidence not as being proof of what the truth of the statements made to him were but only as to what inducement that caused him to do whatever he did.

Mr. Carney: Very well.

Mr. Mosser: You may continue. [42]

The Witness: So I went in the office and asked them if we are going to shift or not because sometimes, you see, they change mind. So they told me, "You are no going to move because no pilot or tugs come on board to shift you." He was in contact with the agent. I asked him to phone to the agent and ask him. So he said the agent knows every-

(Testimony of Alexandros Apostolatos.)

thing and we can't do anything so, "You have to stay."

Q. (By Mr. Mosser): Your ship is still in the same position, is that correct? A. Yes, sir.

Q. What is your nationality, sir?

A. Greek.

Q. Is the Capetan Yemelos in any scheduled run or does it just pick up cargo here and there?

A. Yes; just pick the cargoes up. Tramp ship. Is tramp ship.

Q. Tramp steamer? A. Yes.

Q. And the cargo you were to pick up here was a full cargo of barley for carriage to Germany?

A. Yes, sir.

Mr. Mosser: That's all.

Cross Examination

Q. (By Mr. Carney): What flag does your ship fly? [43] A. Liberian.

Q. Have you ever been to Liberia?

A. I visited—in the country of Liberia, no.

Q. You have never been in the country of Liberia? A. No.

Q. Are there any Liberian seamen aboard ship?

A. No.

Q. Is the owner of the ship, as far as you know, a Liberian?

A. I couldn't tell you. I don't know. I know only the company.

Q. How long have you been aboard this ship?

A. Aboard the ship I have only been for three months.

(Testimony of Alexandros Apostolatos.)

Q. During that period of time the ship has never gone to Liberia? A. No.

Q. Do you know if it ever has been to Liberia?

A. I couldn't tell you. I don't know.

Q. Pardon me? A. I don't know.

Q. You don't know of it ever having been there, do you? A. No, I don't.

Q. Are you sailing under Articles at the present time? A. Yeah.

Q. Where were those Articles entered into, what port? A. Rotterdam. [44]

Q. Rotterdam. Are they Liberian Articles?

A. Yes, sir.

Q. Are they Dutch Articles?

A. No; they are Liberian.

Q. How do you know that they are Liberian?

A. Because I saw them.

Q. Are they written in that language? Are they written in English? A. In English.

Q. They are written in English?

A. Yeah.

Q. Well, no Liberian Government official took part in the signing of the Articles, did they?

A. Oh, yes.

Q. Yes? They did? A. Yes.

Q. In Rotterdam? A. Yes.

Q. Do you belong to a union? A. Yeah.

Q. What union is that?

A. As we call it, this PNO is Greek union for the Greek officers.

(Testimony of Alexandros Apostolatos.)

Q. Are the members of the crew members of a union? A. Yes, they are. [45]

Q. What union is that?

A. Well, I couldn't exactly tell you for the sailors. I mean, there are a few unions. But for the officers is the PNO, Peace, as we call it.

Q. In other words, the members of the crew——

A. Yeah.

Q. ——on the ship? A. Yes.

Q. Some of them belong to some unions and some of them belong to different unions; is that right? A. Yeah.

Q. In other words, all of them do not belong to the same union? A. No.

Q. Some of them do not belong to any union at all?

A. Oh, most of them, they belong.

Q. But there are some that do not?

A. Well, I don't know about this.

Q. Now, do you have in effect aboard your ship any union agreement that covered the——

A. Yeah.

Q. ——wages of the members of the crew?

A. Yes, sir.

Q. What agreement is that?

A. Especially in this ship we follow the Greek Collective Agreement of 1957. [46]

Q. The Greek Collective Agreement?

A. Yeah.

Q. That is an agreement in 1957?

A. '57, yeah.

(Testimony of Alexandros Apostolatos.)

Q. Now——

A. So, every union—every Greek union is taking place in that agreement.

Q. I didn't understand what you said.

A. Well, that's the Greek Collective Agreement, all the seamen union, they belong. I mean, they agree to that agreement, all the Greek unions.

Q. Do you have a copy of that agreement?

A. Not with me.

Q. Do you have one on the ship?

A. I think so. I am not pretty sure.

Q. You are not sure whether you have a copy of the agreement?

A. I am not sure. I may find one.

Q. It might be difficult for you to find one?

A. Well, I had one. I don't remember if I have it with me.

Q. All right. Now, have you ever talked to a representative of that union with respect to the provisions of this contract? A. Well, yes.

Q. Where? A. In Greece. [47]

Q. In Greece?

A. And last time was in, if I remember—well, Germany.

Q. In Germany?

A. In Germany. Was a representative.

Q. He came aboard the ship? A. Yeah.

Q. Now, what is your salary?

A. What is my salary?

Q. Yes. A. Is 74 pounds.

Q. And converted into American dollars?

(Testimony of Alexandros Apostolatos.)

A. By 2.80.

Q. Two hundred and eighty?

A. No; 2.80. Each pound is 2.80. Two dollars and eighty cents. And that means about——

Q. Let me ask you this: If you converted your monthly pay into American dollars, how many American dollars would you make a month?

A. Around — including overtime, you mean, or just salary?

Q. Your salary. Your base.

A. About two hundred and thirty.

Q. About two hundred and thirty dollars?

A. Yes.

Q. Then how much in dollars would you make overtime a month?

A. Overtime, around seventy dollars. [48]

Q. So you would make about——

A. It depends, you see.

Q. Yes. It depends, of course, on how much overtime you get in. A. Yeah.

Q. So, it would vary between two hundred and seventy to three hundred dollars a month?

A. Yeah.

Q. Now, how much does a regular seaman, an able seaman aboard the ship make per month in American dollars? A. Sailors, you mean?

Q. Sailors.

A. Around a hundred and twenty dollars.

Q. More or less depending on their rate and depending on how much overtime they put in?

A. No; except overtime.

(Testimony of Alexandros Apostolatos.)

Q. Oh. Then they have some overtime that would be——

A. They have some overtime. They have some extra jobs like cleaning quarters or——

Q. That would amount to, maybe, another thirty or forty dollars a month?

A. It depends. It all depends, you see.

Q. Well, in other words, they wouldn't make over three hundred a month?

A. Oh, no. [49]

Q. They would make more like two hundred a month? A. Oh, yes.

Q. Now, you said that the ship which you are presently employed by is a tramp vessel.

A. Yeah.

Q. Which means that it goes from port to port, depending on what charters it can have; is that right? A. Yes, sir.

Q. So as you know, the shipowners bid for these charters as to how much they will carry a given cargo for? That's the way you get a charter, isn't it?

A. Yeah.

Q. The lowest bidder gets to carry the goods?

A. Yeah.

The Court: It wouldn't be safe to say that would be the free American enterprise system, would it?

Mr. Mosser: I think it might.

Mr. Carney. I don't know. I don't have any more questions of this witness.

Redirect Examination

Q. (By Mr. Mosser): Mr. Apostolatos, was it

(Testimony of Alexandros Apostolatos.)

a Liberian Consul that witnessed the signing of the Articles when you signed them?

A. Oh, yes. [50]

Q. Was it a representative of the Greek union that was aboard the vessel in Germany that talked to you there? A. Yes; there was one.

Q. Do you know how your wage scales—they are considerably below United States wage scales, aren't they? A. Oh, yes; they are below.

Q. Do you know how they compare with other foreign countries?

A. Well, I think that the wages, they have something to do with the cost of living of every country. Well, for our country I think our wages, they are pretty good. But, comparing with foreign countries like, let's say, English or Italians, they are higher.

Q. The Greek wage scales are generally higher than British or Italian? A. Italian or——

Q. Lower than United States or Canada?

A. Or Canada is right.

Q. But the amount of money you're earning as a Greek seaman aboard this vessel, is that a pretty good wage for a Greek citizen to make?

A. Oh, yes; they are.

Q. One or two points that I missed. The owner of the vessel, is that Fianza Company?

A. Compania Naviera.

Q. Do you know what country that company is incorporated in? [51]

A. Panama, I suppose.

Q. Panamanian corporation. And the vessel is

(Testimony of Alexandros Apostolatos.)

here on a specific charter to carry this cargo of barley for Frachten Treuhand, a German company, is that correct?

A. Well, I don't know about this.

Q. You don't know that?

No more questions.

Recross Examination

Q. (By Mr. Carney): Let me ask you, on your previous voyage just before you came to Portland, where had the vessel been?

A. To Hong Kong.

Q. Were you taking some cargo to Hong Kong?

A. Yeah.

Q. What cargo was that?

A. We took fertilizers.

Q. Fertilizers? A. Yeah.

Q. From what port did you take them?

A. Antwerp, Belgium.

Q. From where? A. Antwerp, Belgium.

Q. As I understand it, your ship has a Liberian flag, it has Liberian Articles on it? [52]

A. (Witness nods head.)

Q. The rate of pay in the union agreement is Greek? A. Yeah.

Q. And the ownership of the ship is a Panamanian corporation? A. Yeah.

Q. Where do you live? Do you live in Greece?

A. Yeah.

Q. Do most of the crew members live in Greece?

A. Yes; all of them.

(Testimony of Alexandros Apostolatos.)

Mr. Carney: I have no further questions.

The Court: How many crewmen do you have aboard?

The Witness: Now we have thirty.

Mr. Carney: Thirty?

The Court: Thirty. Were all these crewmen members of the crew at Rotterdam when you signed your present Articles?

The Witness: Oh, yes; they were there.

The Court: And you had been sailing under prior Articles at that time?

The Witness: Yeah.

The Court: Where did you, and, so far as you know, the other members of the crew board this vessel for the first time?

The Witness: Well, you see, they didn't join the ship all together. Some of them for six months.

The Court: I understand. [53]

The Witness: Some of them before one year. But I could say the most of the time was Belgian.

The Court: Well, am I wrong, it is my understanding that it is the policy of some of the countries in Europe and, particularly, your country of Greece——

The Witness: Yeah.

The Court: ——that you will recruit a crew in Greece and then transport them by rail across Europe to join a vessel at some given port, whether it be Marseille, Antwerp, Rotterdam, or wherever it is.

The Witness: Yes.

(Testimony of Alexandros Apostolatos.)

The Court: Where were you recruited for your berth on this vessel?

The Witness: Where?

The Court: Where?

The Witness: Antwerp. Oh. You mean—you mean the last time?

The Court: Yes.

The Witness: Where myself joined the ship? In Antwerp.

The Court: Well, I understand that. Now, were you without a berth—you understand what I mean?

The Witness: Yes.

The Court: ——in Antwerp and just went to sign up on this vessel, or had you been on some other vessel before you joined? [54]

The Witness: Oh, I had been on another vessel before.

The Court: And you left your prior berth in Antwerp and then joined up with this——

The Witness: No; in Rotterdam.

The Court: I beg your pardon. Rotterdam. Now I understand. So far as the number of crew that you may know of, where were they recruited to join the ship?

The Witness: Oh, I don't know.

The Court: You don't know?

The Witness: I couldn't tell you.

The Court: All right.

Does plaintiff have any questions in line with the Court's questioning?

Mr. Mosser: No, your Honor.

(Testimony of Alexandros Apostolatos.)

The Court: Defendant?

Mr. Carney: No other questions.

The Court: That is all, sir. You may step down.

(Witness excused.)

Mr. Mosser: Now I will call Captain Michael Karras. [55]

MICHAEL KARRAS

produced as a witness in behalf of the Plaintiffs, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

Q. (By Mr. Mosser): Mr. Karras, are you the Captain of the Capetan Yemelos? A. Yes.

Q. And that is a Liberian flag vessel?

A. Yes.

Q. Do you know how long it's been a Liberian flag vessel? A. How many years?

Q. Yes. A. Five, six years.

Q. Do you know where the vessel was built?

A. In Japan.

Q. It was built in Japan? A. Yes.

Q. Has it been a Liberian vessel since it was built or was it under some other flag before it became a Liberian vessel, or do you know? Do you understand my question? A. No.

Q. Has the vessel Capetan Yemelos always been a Liberian flag vessel since it was built?

A. Yes.

Q. Or was it under any other flag? [56]

A. No; all the time with the Liberian flag.

(Testimony of Michael Karras.)

Q. It was built in Japan?

A. (Witness nods head.)

Q. What is your tonnage, Captain?

A. 14,557 dead weight.

Q. That's your dead-weight tonnage. You are here to load a cargo of barley, is that correct?

A. Yes.

Q. Is there a voyage charter for the vessel in connection with that cargo?

A. Voyage charter?

Q. The German company, Frachten Treuhand, are they the charterers? A. Yes.

Q. Your crew are all of Greek nationality or extraction, is that correct?

A. Twenty-nine Greeks and one English.

Q. One English. Is he a radioman?

A. Yes.

Q. The wage scales aboard your vessel are in accordance with a Greek scale, is that correct?

A. Yes.

Q. Has anyone made any demands on you since you have been in this port in connection with the wages or working conditions aboard your ship?

A. No. [57]

Q. Nobody has come to you and said, "We want to represent your crew"? A. No.

Q. "Or negotiate a new agreement for them"?

A. No.

Mr. Mosser: I have no further questions.

The Court: Cross examine.

(Testimony of Michael Karras.)

Cross Examination

Q. (By Mr. Carney): Your ship is only a few years old—it's a new ship, isn't it?

A. Two years old.

Q. Built in 1956? A. March.

Q. Beg your pardon? A. In March.

Q. In March of 1956. Have you been aboard the ship since that time? A. No.

Q. How long have you been on?

A. Two months ago.

Q. Only two months ago? A. Yeah. [58]

Q. Were you ever on it before that?

A. Another ship.

Q. Pardon? A. In other ship.

Q. You were on other ships? A. Yes.

Q. Two months ago is the first time you were ever on this particular ship? A. Yes.

Q. Are you familiar with the various places where this ship has been before you got on there?

A. I do not——

Q. Do you know what voyages?

A. Japan, Canada, India; everywhere.

Q. It's a tramp ship that carries cargo under charter? A. Yes.

Q. There is a number of American ships also, aren't there, that are tramp vessels that carry cargoes under charters? A. Yes.

Q. You have observed them in your experiences? You have seen American ships? A. Yes.

Q. That are tramp ships also? A. Yes.

(Testimony of Michael Karras.)

Q. American ships carry the same type of cargo that your ship carries, don't they? [59]

A. Yes; they——

Q. They carry it to ports in the Orient and to ports in Europe? A. Yes.

Q. From the United States? A. Yes.

Q. Now, as I understand, there is no Liberian crew members aboard your ship, is that right?

A. Yes.

Q. And the company that owns the ship is a company that is registered in Panama?

A. Yes.

Q. Do you know who owns that corporation?

A. All I know is that the operator is in England.

Q. You know that the operator is in England?

A. Yeah.

Q. Do you know the names of the people that own the corporation?

A. I don't know the names of it. Only the title of the corporation.

Q. You only know what?

A. The name of the operators.

Q. What is the name of it?

A. A. Lucey. [60]

Q. Pardon? A. A. Lucey.

Q. Is that an English company?

A. No; Greek.

Q. A Greek company?

A. The operators, they're Greek but they got English and Greek on the side.

Q. I'm sorry. I didn't understand you.

(Testimony of Michael Karras.)

Mr. Mosser: I think the fact is, Mr. Carney, if it would clear it up for you, you can question him further on it, that the Greek citizens control A. Lucey which is a London concern of English incorporation which is operating the vessel. But the ownership of the vessel is under this Panamanian corporation.

Q. (By Mr. Carney): Well, I would like to get this straight because I think these things are at the very crux of it. Starting back, the ship itself is registered in the Port of Monrovia, Liberia; is that correct? A. Yes.

Q. It carries a Liberian flag? A. Yes.

Q. The ship is owned by a corporation?

A. In Panama.

Q. Which is in Panama? A. Yes. [61]

Q. Now, the ship is operated by—that word—Lucey, or whatever it is? A. Yes.

Q. In England? A. Yes.

Q. Is that correct? A. Yes.

Q. The company in England is composed mostly of Greek people? A. Yes.

Q. Is that correct? A. Yeah.

Q. Those Greek people, some live in England and some live some place else? A. Yeah.

Q. Is that correct? A. Yes.

Q. They are all not necessarily Greek citizens, do you understand what I mean? A. Yeah.

Q. In other words, they are Greek nationality but they live in England, some of them?

A. Yeah.

(Testimony of Michael Karras.)

Q. So, do you know who are the owners of this Panamanian corporation? A. No. [62]

Q. You do not know that?

A. (Witness shakes head.)

Q. You are not sure whether or not it is these people in England that actually own the corporation? A. (Witness shakes head.)

Q. Do you know whether or not American citizens have any money in that corporation in Panama? A. I don't.

Q. As far as you know that could be possible, couldn't it? A. (Witness shakes head.)

Q. Well, maybe you don't understand my question. It would be possible, wouldn't it, for American citizens to have some money and investment in this Panamanian corporation?

A. We don't know because we don't know the persons.

Q. You are not told?

A. I am not told. They don't know the names.

Q. In other words——

A. We know only the title of the company. That we know.

Q. I see. You are not told as master of the vessel who the people are that own the vessel?

A. No.

Q. All that you know is it's a Panamanian company? A. Yes.

Q. And you know that there is a company in England that acts as agent or operator? [63]

A. Agents, yes.

(Testimony of Michael Karras.)

Q. And they give you your instructions where you're to go and where you're to pick up your cargo? A. Yes.

Q. They give you instructions with respect to the hiring of crews? A. Yes.

Q. And with respect to what wage scale you will pay? A. Yes.

Q. They tell you all of that? A. Yes.

Q. But you do not know who are the people that actually own the ship? A. No.

Mr. Carney: We have no further questions.

Mr. Mosser: That's all.

The Court: Just so that I may understand counsel's position about the matter, we can have an American vessel plying intercoastal; that is, the Atlantic and the Pacific trade, up and down, and she might have various agents; the Port of Portland, Port of San Francisco, San Pedro—up and down the Atlantic Coast who would have charge of finding cargo for her in any one of the given ports and would be the agent representing the owners whenever that vessel was in at their given port. Now, are you making the distinction between [64] these English operators and that type of an agent?

Mr. Carney: Yes. There is a distinction, your Honor. I think the type of an agent that the Court described is most often called a husbanding agent.

The Court: Yes.

Mr. Carney: That is, it is an agency which takes care of provisioning the ship and the other

(Testimony of Michael Karras.)

details that are needed when a ship reaches various ports.

The Court: Taking care of the crew problems that arise.

Mr. Carney: Wages and furnishing funds to the ship and furnishing it with fuel, and things like that, that it needs. Those agents are called husbanding agents, I believe. But those agents very, very rarely have anything to do with the charters for the ship or directing the ship where it will go.

That is usually centralized in one company which is the operating company for the ship.

Now, the questions that I was asking him were not with respect to husbanding agents, because they probably have some American company here in Portland. I don't know which one: William Stein & Company; International Shipping Company. Some company here in Portland to act as their husbanding agent when the ship comes in here to take care of the details that are needed to be taken care of ashore while the ship is here. But all these ships that are operated, if it is an American company, the company itself will direct the ships as to where [65] they will go and as to their charters and as to their crew and things like that.

But this ship is a Panamanian corporation and, as I understand from his testimony, that Panamanian corporation itself does not do any of the operating of the ship but have delegated that to one particular company in London to find charters for it and to do the general operating of the ship.

(Testimony of Michael Karras.)

The Court: I understand your position about it.

Mr. Carney: So, the thing that I was inquiring of him was, I am trying to find out—which we can never find out in these cases—is who owns the ship, who are the actual people. Are they American citizens or are they English citizens? Are they Greek citizens? He doesn't know who owns the ship except that some people who own stock in a Panamanian corporation own the ship and they have delegated the operation of it to another company in England.

The Court: Well, this matter has been stewing for awhile. As a matter of inquiry to the defendants, have you made any inquiry of the agency in charge of the corporation in Panama as to whether or not you could ascertain the stockholders, the management, of the Panamanian corporation, who is the owner of the vessel?

Mr. Carney: We haven't had time to do it in this case.

The Court: I see.

Mr. Carney: I have not made an inquiry in other case. [66] So I don't know whether it would be possible or not.

The Court: Well, I don't know either. I just made the inquiry. I didn't mean to interrupt.

Have you concluded?

Mr. Carney: I had completed my questioning.

The Court: Anything further?

Mr. Mosser: Nothing further.

The Court: That is all, sir. You may step down.

(Witness excused.)

Mr. Mosser: I think that completes the plaintiffs' prima facie case, your Honor.

The Court: Very well.

Mr. Carney: Your Honor, I notice it is close to the noon hour. I would like to argue with respect to the sufficiency of his prima facie case.

Now, if you would like us to continue we can argue now. Perhaps the Court, during the——

The Court: Well, don't you think, Mr. Carney, that we are going to get a more satisfactory result about the matter if we hear what the evidence is?

Mr. Carney: Well, yes. We can go ahead and put on our——

The Court: For the Court now at the state of this evidence—I have to accept it in its full light, giving it all the inferences that are involved. It appears from the [67] evidence now before the Court, giving the plaintiffs' case the benefit of all the inferences, and assuming it to be true, as we have to, if an attack is made at this time that this is a completely foreign-owned and operated vessel. Now, if your position be otherwise I think your record in this matter will be much better fortified —and it is exactly what happened in the New York case—I think that you ought to put on your position.

Mr. Carney: Well, yes. We are prepared to do that. Do you want——

The Court: But, it is right at noon.

Mr. Carney: Would the Court like me to leave with you during the noon hour the opinion from New York?

The Court: Well, I was in telephone contact with New York yesterday and I know pretty generally Judge Bryan's theories as they are involved. But I am most grateful to have his full oral opinion and I would like to have it at a convenient time.

Now, do you wish to keep it until you finish your case?

Mr. Carney: No. You may have it now.

Mr. Mosser: I haven't yet been able to get a copy of it. If your Honor is going to use it during the noon hour I wouldn't think of taking it. But if you are not going to use it I would be glad to take it to my office and photostat it [68] so that we may all three have copies of it. I am sure it could be done in about 45 minutes.

The Court: Well, I don't propose to look at it during the lunch hour because I want to have the benefit of the other position under my belt before I begin to consider this. If you would like to take it and photostat it I think we will all be obliged to you.

I talked to Judge Bryan about the matter and he said that it was an oral opinion and he had not reduced it to final writing and he didn't know if he ever would get to it because he was involved in the American Airlines strike.

Mr. Carney: He made some comments on that.

The Court: But say 1:45. [69]

(At 12:00 o'clock noon Court adjourned.)

Afternoon Session

(At 1:45 p.m., pursuant to noon adjournment, Court reconvened.)

The Court: Just for the sake of the record, may I ask you, Mr. Mosser, have photostatic copies of Judge Bryan's opinion been supplied?

Mr. Mosser: They have. I have given one to counsel and I have one now.

The Court: Let the record so show.

Mr. Mosser: If the Court please, I am going to ask leave to make one amendment in our complaint and to put on one witness in support of the allegation. It would be on Page 7 in Paragraph XXIII relating to damages that the vessel is suffering. There is a sentence in there that as plaintiff Fianza Company and Naviera S. A. is suffering damage while such picketing continues in an amount in excess of fifteen hundred dollars per day. I want to insert the words "loss of use." And then in addition and as a result of said vessel's inability to load and demand having been made that it move from its berth at Irving—said Irving Dock at 11:00 a.m. December 1, 1958, and plaintiffs' inability to move the vessel as a result of said picketing activity, plaintiff has become liable under the tariff of said Irving Dock for damages at the rate of one hundred dollars per hour from the [70] time when said move was demanded; and that the prayer for relief would then run the damages up to fifteen hundred plus one hundred dollars an hour from 11:00 a.m.—fifteen hundred dollars a day plus one

hundred dollars an hour for twenty-four hundred a day from 11:00 a.m.——

The Court: Well, that shouldn't be a matter of surprise to any party. You may make the amendment. I would suggest that you draw that in the form of a flyleaf that may be attached to Page 7.

Mr. Mosser: Thank you, your Honor. [71]

If I may reopen I would call Captain Jensen as a witness at this time.

JOHN JENSEN

produced as a witness in behalf of the Plaintiffs, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

Q. (By Mr. Mosser): Captain Jensen, with whom are you employed?

A. I am employed by International Shipping Company as Operation Manager.

Q. Is International Shipping Company serving in any capacity in relation to the SS Capetan Yemelos?

A. We are acting as owners, protective agents.

Q. Is that ship husbanding at this port?

A. It's being husbanded by our company.

Mr. Mosser: I will ask this be marked Plaintiffs' Exhibit 5 and these two pages Plaintiffs' Exhibit 6, Pages 1 and 2.

(At this point a document entitled "Agreement" was marked for identification as Plaintiffs' Exhibit 5; a document purported to be an

(Testimony of John Jensen.)

extract of tariff, Pages 1 and 2 thereof, were marked for identification as Plaintiffs' Exhibits 6-A and 6-B, respectively.)

Q. (By Mr. Mosser): I will ask you, Captain, if you can identify Plaintiffs' Exhibit 5, which is a letter. [72] A. I do.

Q. What is that?

A. That is pursuant to our agreement referring to letter received from Balfour Guthrie stipulating that we are liable under Item 24 in the tariff letter. "Vessels which will incur a penalty"——

Mr. Carney: I would say, your Honor, that it speaks for itself.

The Court: Yes. It has not been admitted into evidence. Do you offer it?

Mr. Mosser: I will offer it.

The Court: Any objection?

Mr. Carney: We have no objection to the letter that's been identified by the witness as having been received.

The Court: It will be received.

(At this point the document entitled "Agreement," having been previously marked for identification, was received in evidence as Plaintiffs' Exhibit 5.)

The Court: Now, either party may read it into the record.

Mr. Mosser: Is it your practice, your Honor, to have documents read into the record?

The Court: Whatever you wish.

Mr. Mosser: If it is in the record after being

(Testimony of John Jensen.)

offered in evidence I don't particularly wish to read it at this time. [73]

The Court: Very well. It is before the Court.

Q. (By Mr. Mosser): Can you identify the second exhibit there which has two pages?

A. Marked 6-A, Page 8 and 9?

Q. Yes. A. I do.

Q. What is that?

A. This is an extract of the tariff, Balfour Guthrie Elevator Tariff. This is a photostatic copy of the tariff we have in our office.

Mr. Mosser: I will offer it.

The Court: Any objection?

Mr. Carney: Yes. I will object to it, your Honor, because it is only a partial—couple of pages of the tariff and it is not the entire tariff or the entire document. We feel, your Honor, that the entire document should be in evidence because there is probably other matters that would refer to this.

The Court: Well, we can't take things out of context. Your objection will be sustained.

Mr. Mosser: May I have the exhibit, please?

The Court: Now, as I understand, the whole issue of this matter that you are attempting to put into evidence now is the hourly rate charged by the——

Mr. Mosser: There is a tariff provision, your Honor, [74] specifying that if the vessel fails to move when demand is made the vessel will be assessed a penalty of a hundred dollars an hour from the time of notice to vacate until berth is vacated.

(Testimony of John Jensen.)

The Court: All right. Now, I understand your position. Do you accept that position or do you wish proof?

Mr. Carney: We wish proof on it, your Honor.

The Court: All right, you may have it.

Mr. Mosser: Your Honor, subject to the ruling which you have just made, I would like your Honor to examine this because the Item 24 of the tariff, it seems to me, is complete in itself. That complete item of the tariff is here and has no cross references to other items of the tariff.

Mr. Carney: We don't know until we see the whole tariff, your Honor, whether there are other parts of the tariff which would cross-reference back to this.

The Court: Yes. I agree with you. It may be taken out of context or it may not, I do not know. But it is just too easy to get the whole tariff here.

Mr. Mosser: Very well, your Honor.

Q. Captain Jensen, in your business at International Shipping Company do you have anything to do with the charters of vessels of this type, tramp steamers?

A. Yes. We do quite a bit of chartering cargo, boating and cargo booking. [75]

Q. Are you generally familiar with the prevailing rates of charter on vessels at this time?

A. Yes.

Q. I will specify that: of vessels of a dry cargo type such as the SS Capetan Yemelos?

(Testimony of John Jensen.)

A. Well, in the present market it is worth fifteen to two thousand dollars a day.

Q. Fifteen hundred to two thousand dollars a day? A. That's correct.

Mr. Mosser: No further questions.

The Court: Cross examine.

Cross Examination

Q. (By Mr. Carney): Does that charter rate vary from time to time?

A. Yes; depending on the market conditions, of course.

Q. The market condition is influenced by the number and types of ships which are available, is that right? A. That is correct.

The Court: Wouldn't our inquiry be as to the immediate time? I can understand that in one given year it might be different than another. But we are dealing with a specific time. Let's inquire as to the time that is involved.

Mr. Carney: Very well.

Q. Now, at the present time you gave the rate as being [76] approximately fifteen hundred dollars a day, as I understand it; is that right?

A. That's an approximate figure only.

Q. Now, in the recent past has that varied very much?

A. Oh, for three months—about three months ago the market went clear down to about four dollars and a half whereas now it's nine and a half.

(Testimony of John Jensen.)

Q. Per ton? That is expressed per ton? How much would that be per day?

A. We will put it a ship. It's barely breaking even. Say, worth about nine hundred dollars a day.

Q. I didn't quite understand your answer. In other words, a break-even point is around nine hundred dollars a day? A. That is correct.

Q. That a ship can earn?

A. That's per break even. Add operational costs and that type of thing.

Q. Now, depending on the different types of flags, the operational costs vary, don't they?

A. Well, for instance, an American ship, it will run about twenty-five hundred dollars a day.

Q. That is at the present time? A. Yes.

Q. That has been twenty-five hundred or two thousand, in that vicinity, for a year or two, would you say? [77]

A. No. In recent—since about January of 1958 till about October this year the market was the lowest in quite a few years since about '47 or '48.

Q. What would be the American rate in that period of time?

A. Commercial market or Government support?

Q. Well, in commercial market.

A. Commercial market, compare their freight for an American ship, runs about fourteen to fifteen dollars a ton. If it is a foreign vessel it will run about eight or nine dollars a ton.

Q. In other words, American is fourteen or fif-

(Testimony of John Jensen.)

teen dollars a ton and the foreign is eight or nine dollars a ton?

A. That's only approximate figures, of course.

Q. But the foreign ship, then, in all cases is able to carry cargo at a lesser cost than the American ships?

A. Any foreign flag can carry for less than it costs on an American ship. That's an established fact.

Mr. Carney: That is all.

The Court: We have had some testimony in the case, sir, concerning the Articles that were signed by the crew of this vessel that is involved; that the Articles provided the wage scale that has been agreed upon between representatives of the seamen in Greece, and there was testimony to the effect—whether it be true or not I don't know—that that wage scale was higher than the crewmen of an Italian or a British ship [78] flying those respective flags. Now, have you had dealings with vessels coming into this port flying a British flag?

The Witness: Yes; quite a few, sir.

The Court: What is the cost per day on a British ship?

The Witness: Cost per day for breaking-even point, operational costs, or charter costs?

The Court: Well, you gave the—I will have to ask for your advice about that. You gave the expression that a nine hundred dollar figure was a

(Testimony of John Jensen.)

break-even point in the vessel that you talked about in your testimony.

The Witness: In a British ship of the same type it would run perhaps slightly less, about seven to eight hundred dollars a day operational costs.

The Court: How about Italian?

The Witness: Italian are somewhat lower than that. They would run about six hundred and fifty a day.

Mr. Carney: I would like to inquire a little further.

Q. You said that International Shipping Company with whom you are employed are acting as agents for the owners of this vessel.

A. We are acting as owners' protecting agents through the operators.

Q. Do you know who the owners are?

A. I don't personally know. I haven't really checked up as far as the owner. I just know the registered owner. [79]

Q. Do you know who it was that engaged your company to represent this ship as agent?

A. Through their agency in New York.

Q. In other words, you received your engagement or employment through an agency in New York?

A. Every steamship company has an agent all over the world which is handling their particular interests. Then for various small ports, then, they appoint other agents in that area.

Q. So your company here in Portland received

(Testimony of John Jensen.)

its appointment from another agent in New York?

A. Wire New York from London.

Q. In other words, there was a wire from London to New York that gave the authority to engage you in Portland? A. That is correct.

Q. Is that right?

A. That's the way they usually handle it.

Q. Do you know the names of those various agencies?

A. No; I do not. I'd have to confer with the lists on the various agencies for that.

Q. Do you know who actually owns this ship?

A. Oh, other than the registered owner I do not know.

Q. By "the registered owner" you mean the corporation in Panama?

A. Yes. It's a Liberian flag.

Q. It's a Liberian flag and a corporation in Panama is listed as the owner? [80]

A. Correct.

Q. But outside of that, you do not know who actually owns the ship? A. No, I do not.

Mr. Carney: We have no further questions.

The Court: Any redirect?

Mr. Mosser: No further questions.

The Court: That is all, sir. You may step down.

(Witness excused.)

Mr. Mosser: Subject to bringing up the full tariff, your Honor, that would conclude the plaintiffs' case.

The Court: Very well. You may have that leave.

Mr. Carney: Your Honor, in the noon hour we considered seriously the remarks the Court made at the close of the plaintiffs' case with respect to the, we might call it, the status or the ownership of this vessel. We have attempted during the noon hour to see what we could find with respect to that ownership and as we understand some of the unions in New York try to keep a record of who actually owns some of these ships.

We are trying to determine that. We are also going to, although we haven't started to yet, get the fact of the matter if we can from the Government of Panama.

Now, it is only that testimony that we would care [81] to offer in this case because, I think, the evidence in the case with respect to the situation of various American unions with respect to their protests and whatnot, and with respect to the conditions on American ships and conditions on these other flagships have already come into evidence sufficiently by the witnesses who have already appeared.

We could put other witnesses on who might bring it out more clearly or might supplement it, but I think it would be pretty much cumulative.

But if the Court is concerned on that point, we would like leave and opportunity to produce that evidence.

The Court: Well, Mr. Carney, we have to be realistic about this matter. One of the defendants who was called as an adverse party said that he knew about this matter; he read about it in The

Oregonian; that he knew that there was a national movement for a four-day demonstration against these vessels and their practices. I am frank to tell you that I am not disturbed by your lack of preparation.

Mr. Carney: Well, it isn't a matter of lack of preparation, your Honor. The plaintiffs are the parties here who are seeking the extraordinary remedy of a court by an injunction.

The Court: Well, now, all I can ask you is—they put on a prima facie case. They have established the fact that there were individuals who carried—not unlike a picket line, [82] but being distinguished—as claiming unfair practices; that there was a matter of protest. They have also established that contemporaneously with the appearance of those individuals that workage of this vessel stopped.

Now, are you content to leave the record in that state of affairs, or do you wish to go forward and produce any evidence?

Mr. Carney: Well, I think we will call one witness on it.

The Court: All right.

Mr. Carney: We will call Mr. Coleman. [83]

ART COLEMAN

produced as a witness in behalf of the Defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Carney): Mr. Coleman, what is your address?

(Testimony of Art Coleman.)

A. My address is Box 9, Beaver Creek, Oregon.

Q. What is your occupation?

A. I am the Port Agent for the Marine Firemen's Union.

Q. The Marine Firemen's Union is affiliated with what other union?

A. We are affiliated with the SIU.

Q. That is the Seafarers' International Union?

A. Yes.

Q. Now, the people who are in your union, the Marine Firemen's Union, will you tell us in what employment they are engaged?

A. There is quite a few of them. The electricians, reefer enginers, deck engineers, firemen, water tenders, oilers, wipers—I will have to look it up.

Q. Well, the general engine room department employees?

A. The engine room, that's correct. The unlicensed personnel.

Q. On what type of ships are they employed?

A. They're employed on all types of ships: C-2, C-3, Victories, Liberty ships, steam, Diesel. [84]

Q. Your union represents employees mostly engaged on ships on the West Coast of the United States, is that right?

A. We have ships that run intercoastal, into the East Coast. We have ships that run foreign but they mostly operate out of the West Coast.

Q. Now, have your members been employed and

(Testimony of Art Coleman.)

are they presently employed aboard vessels which are engaged in the tramp trade?

A. Yes. There is only one company now that I know of in the Port of Portland that has—operates vessels in the tramp trade, and that is the West Coast Steamship Company.

Q. In the recent years past have there been more than one company engaged in those operations?

A. Yes; considerably amount more. It was up until about a year ago that they have been lots of ships running on the tramp trade. But as of a year ago there is only one company that I know of now and that is the West Coast Steamship Company.

Q. What principal cargo is carried out of the Port of Portland by tramp vessels?

A. Oh, they haul grain, coal, scrap iron, and if they get a chance they carry general cargo.

Q. Now, within the last——

The Court: Just as a matter of record and for pride of [85] our own area couldn't we say that we are the biggest dry port cargo on the Pacific Coast?

Mr. Carney: I think that's true, your Honor, and especially with respect to the carriage of grain.

Q. Now, have you observed during the past year with respect to the carriage of such cargoes from the Port of Portland as to the flag of the vessels carrying those cargoes?

A. Oh, in the past there was a lot of ships com-

(Testimony of Art Coleman.)

ing in here flying the American flag, but in the last year it is mostly Panamanian, Honduran, Costa Rican, Japanese, and there might be a little of everything but the American flag. The American flag—there is a ship—the Merchant Marine—the United States Merchant Marine is dwindling very, very fast.

Q. Now, with respect to employment and through your union do you have a hiring hall?

A. We do.

Q. Is your work connected with that?

A. It is.

Q. What has the condition been with respect to opportunities for employment during the past year or so as compared to previous years?

A. During the past year it has been very, very slack. In fact, our membership—the employment has been so slack with the Firemen's Union that in the past they voted to leave a man stay on the ship for one year and then he was to get off [86] and rotate the work with somebody else.

Since that time work has got so slack that now they have lowered that to six months on the ship and to rotate the work. The man stays on for six months and then gets off to make more jobs for the rest of the fellows.

Q. Now, have you——

A. Now we have it on our ballot—they are voting on it at the present time—to make it seven months instead of six months for the benefit of the old-timers that has been in the industry for

(Testimony of Art Coleman.)

years on account of their pension. They have to have twenty years in the last thirty to apply—to be eligible for pension.

Q. Have you yourself been aboard or have any knowledge of the conditions on these Liberian flag and Panamanian flag and other flagships that are hauling cargoes of grain from the Port of Portland? A. No.

Q. I mean, aboard them, not with respect to working there but to see what their working conditions are?

A. Actually being aboard the ship?

Q. Yes. A. No.

Q. Have you some information with respect to what the conditions are on those ships?

Mr. Mosser: I would object to information unless it is identified as to the source and relative——

Q. (By Mr. Carney): Well, I will ask you whether or not the Liberian flagships are subjected to the Coast Guard inspection that the American ships are subjected to.

A. Truthfully, I couldn't say yes or no. I don't think they are.

Q. During this week have you had information or have you known of a protest that is being carried out with respect to Liberian flags and other such flagships in this port? A. I do.

Q. You yourself—you have not made a protest on the docks yourself, have you?

A. No; nor have I asked anyone else to go down to the docks and protest. It's all voluntary.

(Testimony of Art Coleman.)

Q. Voluntary? A. If I may say——

Q. Have unions that your union is affiliated with passed a resolution with respect to this protest that you know of?

A. The International Transport Workers did.

Q. The International Transport Workers Federation passed such a resolution?

A. That's right.

Q. In that resolution did they determine that they would make an external protest with respect to the ships during the period of December 1, 1958, for a period of four days? [88]

A. That is correct.

Q. Is it your information that the banners which are being displayed at these vessels are part of that protest? A. It is.

Q. Does the protest concern the competition and variations in working conditions aboard those foreign flagships as compared with the conditions which you have under your union agreement?

A. That is the big part of the protest.

Q. Has your union or any union made any agreement or contact with the Longshoremen's Union with respect to refusing to go aboard ship where such protests are being carried out?

A. We have made no contact with any other union outside of the Maritime group about going aboard the ships or working the ships. We are not down there to protest the working of the ships or to stop workage in any way or form. It is more or less a protest to let the citizens of the United States

(Testimony of Art Coleman.)

know what is going on on these—what we call—runaway flagships and breaking down our conditions.

Q. Is the International Longshoremen's Union, ILWU, an affiliate of the International Transport Federation? A. Not that I know of.

Q. Has it been your purpose in displaying these banners at the ship to prevent other people from working on the ship?

A. Absolutely not. [89]

Q. Well, maybe I have already said it, but what is the purpose of the displaying of these banners during this four-day period?

A. As United States citizens these fellows figure they are allowed to carry these banners and put out publicity and let the people know, the citizens of the United States, know what is going on aboard their ships and the difference in wages and the difference in conditions aboard their ships and ours and trying to bring us down to a lower standard of living.

Mr. Carney: No further questions.

Cross Examination

Q. (By Mr. Mosser): Mr. Coleman, you said you hadn't had any contact with any unions outside the Maritime group. There have been some conferences among the leaders of the Maritime — local Maritime Unions and Pacific Maritime Unions, have there not?

A. Oh, we talked. Why, certainly, we have our little caucuses and get-togethers. We have been having them for years.

(Testimony of Art Coleman.)

Q. Was there a meeting last Friday to determine action in relation to this boycott of such a group?

Mr. Carney: Are you referring to a meeting in Portland or some place else?

Mr. Mosser: Would you hand me Plaintiffs' Exhibit 4, [90] please? I just noticed in this issue of the Stewards News it said a number of West Coast unions are due to meet today to plan for the protest in this area.

Q. Do you know anything about such a meeting? This was published last Friday, November——

A. Is that a Portland paper, San Francisco?

The Court: Show the witness the paper so he may be advised.

The Witness: This was published in San Francisco.

Q. (By Mr. Mosser): There were no meetings here of that kind?

A. We always have meetings amongst our own departments, the SIU, the Marine Cooks and Stewards, the Sailors' Union of the Pacific, and the Firemen. We have been carrying on little meetings, our officials, for a number of years.

Q. Has this boycott been discussed at any such meeting? A. We——

Mr. Carney: What boycott?

The Witness: We have no—we have no——

Mr. Carney: Just a moment!

The Court: Just a moment!

Mr. Carney: We object to the form of the question as inserting a conclusion in the question.

(Testimony of Art Coleman.)

Mr. Mosser: I am using the language of their own union newspaper.

Q. But, I will say this action in carrying banners down at [91] the Irving Dock and the other docks around Portland, was that discussed at any such meeting?

A. For your information, this is not our — our paper here. This is the Stewards News. Ours is the Marine Firemen's.

Q. Yes, sir. I understand that. Now, my question is, was this action discussed by your little Maritime group of unions? A. We talked it over.

Q. Now, you say that the sole purpose of this action is to inform the American people concerning this? A. That is correct.

Q. Now, you want to inform the people in Portland here of it?

A. Not only in Portland, but all over the — all over the United States. In fact, it is international.

Q. How many people are there down on the Irving Dock? A. I don't know.

Q. Are there usually very many people down there?

A. I don't know. It's been several years since I have been down to the Irving Dock.

Q. Would you say that there are more or less people there than by Meier & Frank's corner on an average day? A. Probably is.

Q. More at the Irving Dock?

A. Probably more in Meier & Frank's, I say.

(Testimony of Art Coleman.)

Q. You are not giving out any publicity of this kind down by Meier & Frank, are you? [92]

A. I don't know. There may be. I don't know. I didn't put any up there, if that's what you're getting at. I see them—I see these pamphlets quite a ways uptown around Salmon Street. I did notice a few of them on the sidewalks and that.

Mr. Mosser: No further questions.

Redirect Examination

Q. (By Mr. Carney): Did you or anyone in any of the Maritime groups contact any towboat or tugboat operators with respect to moving of this vessel, the Capetan Yemelos?

Mr. Mosser: I will object.

The Court: Let me hear your objection.

Mr. Mosser: Mr. Carney's question was: "Did you or anybody in any of these groups." I don't mind him answering for himself but I don't see how he knows whether anybody in any of the groups——

The Court: Place the question so far as to his knowledge.

Q. (By Mr. Carney): So far as you know did you or any one of the other members of the Maritime Unions in Portland that you are associated with request or ask or in any way induce the tugboat operators not to handle the SS Capetan Yemelos?

A. I did not. And as far as I know none of the other—the groups did. I don't know what the gentleman's name is [93] there, but he asked me a

(Testimony of Art Coleman.)

question if we discussed this in our little meeting and I answered "Yes." And——

Mr. Carney: Just answer the question I asked you.

The Witness: Okeh.

Mr. Carney: I just wanted to get that cleared up with respect to the tugboat.

The Court: You see, the Court has a problem on its hands and wants to be advised as best it can. You stated that you discussed this problem as you described it being nationwide among your group. Was there any decision made as to what action you would take?

The Witness: We went so far as this: that we would let our membership know about it and we showed them our pamphlets, the pamphlets which were written, and the membership volunteered to go down there. We did not send them down there. We didn't ask them to go down there. But they took it on their own to go down there to wear these banners.

But, as far as asking any of them, we did not do that. We also advised them when they did go down there to not stop any truck drivers, freight trains, pilots, longshore or anybody else that wanted to work that ship.

The purpose of it was not to stop work.

The Court: Now, in asking members of the organization to do this volunteer work that many of us are asked to do in our daily lives, is there any

(Testimony of Art Coleman.)

retaliation made if an [94] individual does not do it?

The Witness: What do you mean, your Honor, "retaliation"?

The Court: Well, within the members of the union is there any fine levied?

The Witness: No, sir.

The Court: So your testimony is that if you asked somebody to voluntarily distribute these handbills and they said, "No, I won't have anything to do with it," that would be the end of it?

The Witness: That is correct.

The Court: Now, the next problem that the Court has to decide is for what reason has the ship stopped to be worked.

The Witness: I cannot answer that question. Honestly, I could not answer it. We did not ask nobody to stop work. We tried to keep nobody through our protest lines whatsoever.

The Court: Well, am I so naive as to believe that the fact that you made the protest had no effect upon other unions working the ship?

The Witness: Oh, I imagine it—it made a difference, because the ship was not worked. But I mean to say that we did not contact any other unions or anything like that and tell them not to work this ship.

The Court: Well, then, you as an individual member and an officer in one of these unions have no explanation to make as to why this ship has not been worked? [95]

(Testimony of Art Coleman.)

The Witness: No; I couldn't answer that question.

The Court: Thank you for your advice.

Mr. Carney: May I inquire along that line, your Honor, for a moment?

The Court: You may.

Q. (By Mr. Carney): Are the Longshoremen's Unions in Portland members of the Maritime group of unions that you spoke of earlier? A. No.

Q. You are not at all affiliated with the ILWU at all, are you? A. No.

Q. They are not a member of this ITF and didn't participate in any resolution?

A. (Witness shakes head.)

The Court: So that I may be further advised, do you know if there is any vessel in the port of either Vancouver, as we call it, or Port of Portland, Vancouver, Longview and Portland flying the British flag?

The Witness: Not that I know of.

The Court: Has there been recently?

The Witness: Not to my knowledge.

The Court: Or any vessel flying the Italian flag?

The Witness: We get what we call the shipping guide down there every morning and we go through that. We are more [96] particular and more concerned under the ships under our contract than we are in case a ship comes out and it pays off, or something like that, and they have got beefs on them with——

The Court: I understand that.

(Testimony of Art Coleman.)

The Witness: As a rule we don't pay too much attention. We go by the waterfront, or something like that, we notice all those ships in, but—there is ships in the harbor and we are never called down there to them. But what nationality they are, we don't——

The Court: How did you get knowledge that this particular vessel involved in this litigation was entering the port?

The Witness: I don't remember if that was one in the shipping guide or not. But after—after this protest came up then we started to watching more or less for these Panamanian, Honduran flags, Costa Rican, and so forth.

The Court: Thank you. Any further questions in view of the——

Mr. Mosser: No.

The Court: Mr. Carney, in view of the Court's questioning——

Mr. Carney: No, we have nothing more.

The Court: That is all. You may step down.

(Witness excused.) [97]

Mr. Carney: Could we have just a moment, please, to——

The Court: Yes, indeed you may.

Mr. Carney: We have no further testimony to offer.

Mr. Mosser: Your Honor, I have——

The Court: Redirect?

Mr. Mosser: I have the tariff here.

Would you stipulate that this is the tariff or do

you wish me to call Captain Jensen or another witness again to identify it?

Mr. Carney: I would like to have someone who knows something about it.

The Court: Call your witness.

Mr. Mosser: Captain Jensen.

The Court: Let's have it marked for identification, Mr. Price, while the witness is coming up.

(At this point a booklet entitled "Grain Tariff No. 6" was marked for identification as Plaintiffs' Exhibit 7.)

Mr. Carney: This is something I have in mind in looking, your Honor, and it may take me a minute or——

The Court: You certainly may take your time.

Mr. Carney: I am finished.

(At this point the Crier handed the booklet to the witness.) [98]

JOHN JENSEN

a witness produced in behalf of the Plaintiffs, having been previously duly sworn, was thereupon recalled and testified further as follows:

Direct Examination

Q. (By Mr. Mosser): Captain Jensen, I believe you have now been handed Plaintiffs' Exhibit 7. Can you identify that?

A. Yes; indeed. That's the tariff issued by the warehouse company which is Irving Dock.

Mr. Mosser: I will offer it and, particularly, Article 24 of the tariff, the relevant one.

(Testimony of John Jensen.)

Mr. Carney: I would like to ask him a couple of questions on voir dire.

The Court: Indeed you may on voir dire.

Examination

Q. (By Mr. Carney): This tariff is published by the warehouse company, is that correct?

A. It's called Interior Warehouse Company which is Irving Dock—is their property which is an elevator of the warehouse company.

Q. Is that a private company or is that a public dock? A. No; it's a private concern.

Mr. Carney: Now, I don't have the exhibit there that he [99] marked.

Mr. Mosser: Here it is.

Q. (By Mr. Carney): Now, this—as I remember, the Capetan Yemelos came into port on the 30th of November; is that right?

A. That's correct; arrived in Longview at Long Bell Dock.

Q. So, then, you received a letter on December 2nd with respect to the penalty charges under Item 24? A. That is correct.

Mr. Carney: I have no further questions with respect to the exhibit.

The Court: Is there any objection to the offer?

Mr. Carney: No, we have no objection.

The Court: It will be received with reference to the section that has been mentioned.

(At this point Plaintiffs' Exhibit 7, being a booklet entitled "Grain Tariff No. 6," Article

(Testimony of John Jensen.)

24 thereof, having been previously marked for identification, was received in evidence.)

Mr. Mosser: That's all I have.

Mr. Carney: I would like to examine a little further.

The Court: Cross examine.

Cross Examination

Q. (By Mr. Carney): Now, you have handled a number of ships that have been [100] berthed at the Irving Dock, haven't you? A. Yes, we have.

Q. Is this the first time that you have ever had Item 24 invoked by the company?

A. That is correct.

Q. The first time?

A. This is the first time, to my knowledge, in the past two years.

Q. Now, there are a number of provisions, or a couple of provisions in the tariff, aren't there, that the company—the dock company is not responsible with respect to the delay of a ship if there is a strike or a lack of work with respect to their employees or other employees on the dock?

A. I assume so. I haven't checked the tariff closely so I wouldn't care to state unless I know exactly what it says.

Q. But as you understand Item 24, that is a penalty provision?

A. That is correct; that any time a vessel don't move away from the berth after having been given instructions to do so, Section 24 provides the penalty for it.

(Testimony of John Jensen.)

Q. Even if the vessel is unable to move?

A. Regardless.

Q. But this is the first time that you have had it called to your attention in two years, is that right?

A. At this particular dock in the past two years, yes. [101]

Mr. Carney: I have no further questions.

Mr. Mosser: One——

The Court: So that I may be advised about it, during this period of time that you speak about have you ever had a vessel that was under your agency that was refused to be worked by the servicing people in the port?

The Witness: Have we had another——

The Court: At that dock.

The Witness: Not at that particular berth.

Mr. Mosser: That was the question I was going—referring to.

Mr. Carney: We have no further questions.

The Court: That is all, sir. You may step down.

(Witness excused.)

Mr. Carney: We have no further testimony.

The Court: Any redirect?

Mr. Mosser: No.

The Court: Well, now, what is counsels' desire about argument? Do you wish to be heard orally in the matter?

Mr. Carney: Well, yes, your Honor, we would like to be heard.

The Court: I will certainly hear you.

Mr. Carney: Do you wish to go ahead?

The Court: I think that what we will do in order to [102] collect our thoughts about the matter, we will take a short recess, fifteen minutes' time, and then counsel can go forward and advise the Court as to your respective theories about it. Whether or not I am able to resolve the matter this evening I will not say, but I will say that if not tonight, at 9:45 in the morning I will issue an order about it. And I wish to have the full advice that counsel can give me on it.

Mr. Carney: Would the Court, perhaps, rather—this has come on somewhat hurriedly. Would you rather that we, perhaps, come at 9:30 in the morning? Perhaps we could be better prepared with an argument and, perhaps, an authority.

The Court: I am confronted with this proposition. Judge Bryan in New York was confronted with an emergency matter that this protest was to start. If I recall, reading the accounts of it, he held court until 7:00 o'clock that night and the next morning he delivered orally the opinion of which you have the court reporter's stenographic report on. I think what we had better do is put our shoulder to the wheel today and resolve it if it be true that the testimony shows that this is a four-day protest.

Judge Bryan said in his opinion it may go longer. So I don't want the question to be moot. So I think what I had better do is hear counsel out today and if I am unable to reach a conclusion about it before the evening, I will at 9:45 in the morning. So let's

take a fifteen-minute recess [103] to collect ourselves and then go ahead.

(Recess taken.)

The Court: I will hear from the plaintiff.

Mr. Mosser: For your Honor's convenience I will use the lectern here.

The Court: Well, I haven't asked counsel to do it during this trial because I realized you had so many documents that you had to have.

Mr. Mosser: I think there are times when it is an advantage, but times when it is a disadvantage. But in addressing the Court I think that is one of the times when it has an advantage.

I would like first to dispose of the preliminary jurisdictional question that was raised by Mr. Carney. As I stated at the outset, I think the acts here may well fall within the Sherman Act, but I don't think we have to rely on that for jurisdiction because I think the complaint states a cause of action based on diversity jurisdiction and a common law conspiracy which could be unlawful at common law.

He raised the point that unions are unincorporated associations and have members of many states and even nations and that a union, such an unincorporated association has no citizenship separate from its members.

Now, that, I think, is a correct statement of the law, your Honor. But in this proceeding in a class action [104] it's long been held in Federal Court that the only citizenship which must be looked to is that of the individual defendants who are named as representatives of the other members.

I would like to read just briefly from Ketcher vs. Sheet Metal Workers, 115 Fed. Supp., 802. At Page 811—it is 802. At 811 it says:

"It should be further pointed out that in Count Two of the complaint the plaintiffs are not suing the International Union as such; rather, they are attempting to sue the members of said Union by means of a class action under Rule 23 of the Federal Rules of Civil Procedure; the reason for the plaintiffs' utilization of this device is that in a class action in determining diversity the citizenship of the member or members of the class made a party or parties to the suit governs; the citizenship of other members of the class is ignored."

Then they cite from 2 Barron & Holtzoff, Section 569, Page 176.

"Hence, if the plaintiffs can maintain their class suit against the members of the International Union by suing"—a man's name—"Eilmes, a citizen of Washington, as a member of the class, the jurisdictional obstacle created by the fact [105] that many members of said Union are citizens of Arkansas will have been overcome."

And, there are many more cases that I could cite.

The Court: Well, I am satisfied on that point.

Mr. Mosser: As far as the jurisdictional amount, I think even under our original complaint before amendment we alleged fifteen hundred dollars a day and continuing damages. Well, I don't think the jurisdictional ten thousand dollar amount requires a plaintiff to wait seven days where he is being damaged fifteen hundred dollars a day for seeking an

injunction. The fact is that the damages would build up.

Now, they may claim that the boycott would end in four days, but there is no proof of that. We don't know what will happen in four days. In any event, under the amended complaint stating a substantial larger damages I think there is no question as to the jurisdictional amount.

The Court: Go right ahead.

Mr. Mosser: I think we have proved the allegation of our complaint and the main question is whether they state a cause of action or whether the Court has been deprived of the jurisdiction because of the labor statutes of the United States.

Certainly we showed that this is a Liberian flag vessel with a Greek crew except for one member; that the ownership is a Panamanian corporation; that the operators [106] of it are a London concern controlled by Greeks. I might interject here in line with your Honor's question on agency that it has been my experience that many of the European nations, the British, the Greeks, the Norwegians, particularly, that I have had contact with have a separate company for management and operation of their vessels from the company which technically owns the vessel.

They pool a number of vessels together in one operating company even though the ownership may be separate. It is just a common device that is used there.

Now, I think the fact that this is completely foreign is one fact which distinguishes it from the case

that was decided in New York. I noticed in hastily scanning—and I don't pretend to be thoroughly familiar with this opinion yet—but in scanning Judge Bryan's opinion, on Page 23 he states:

"It is a conceded fact that the plaintiff corporations are owned and controlled by major American industrial companies."

That is quite likely, as I said earlier. If 42 per cent of the so-called flag of necessities or haven flagships are ultimately American-controlled, that still leaves 58 per cent foreign-controlled.

I think we have proved that the pickets showed up at the dock when the vessel arrived to load this cargo and [107] that the ship has been unable to load or even to move from its berth since then.

Now, there was some talk here that this was not intended to be a picket line, it wasn't intended to stop work on those vessels. I have heard that in almost every labor case I have been in, I think. They are just talking. They don't mean to do any harm at all. But I think if we look just at Plaintiffs' Exhibit 4, which is admitted to be the official newspaper of the Marine Cooks and Stewards, we find that they have this:

"Message to all waterfront workers"—on the front page——

"on the Panlibhonco Boycott. Arrangements for boycott are now being made. Your union will tell you how you can play your part."

Then it winds up:

"Time for action. Panlibhonco must be checked before it is too late, before your standards are damaged beyond repair. These ships without acceptable agreements are 'black.' 'Black' ships mean less in your pockets in the long run. Remember that when your union calls for your support.

The details of the boycott will be given to you in good time. [108]

When the time comes for action, act quickly and act together."

The fact that they placed their pickets down at the Irving Dock where people having business with this ship would be bound to go instead of in the places where they could get the attention of the maximum number of people if they were merely interested in publicity — I think the Court certainly realizes the fact of modern-day labor union techniques and the effect—as the witness himself admitted, this probably did have an effect on the workers as to whether they would go and work on this ship.

The Court: Of course, I am disturbed a little bit because of the fact that we do have before us this very learned opinion by Judge Bryan. In reading his account of the issues that are involved, which seem to be entirely different from the issues that we have here, he says, "The defendants concede that they intended to carry out their plans." And that was this four-day International plan of action to be carried out in some 62 countries throughout the world. "The defendants concede that they intend to carry out their plans:

(1) By picketing the plaintiffs' ships and induc-

ing other organizations to picket the ships while they are in any port in the United States;

(2) By inducing their members, who are [109] employees of tugboats and other craft which service plaintiffs' ships, not to aid in the docking and servicing of plaintiffs' ships while they are in port," et cetera.

Now, we have here, so far as the defendants' case is concerned, that there was no picketing; that it was merely a protest. So in order to resolve the matter that we have at our hands, let us accept for the sake of argument that this was not intended as a picket line, it was merely intended as members of a union or group of unions to protest to other unions their thoughts concerning the vessel involved.

Now, do I make myself clear on that?

Mr. Mosser: Well, certainly I would say that this is a different case in that counsel for the defendants has not conceded as New York counsel frankly did, that one of the purposes was to tie up the ships.

The Court: Yes.

Mr. Mosser: I frankly fail to see the difference between what they call protest here and what is normally called picketing in a labor case.

What is picketing but carrying up and down a banner stating the position in an abbreviated form of the carrier for the benefit or knowledge or action of other people, usually other union people? That is what they were doing here, I submit. [110]

As I say, this is a point that comes up in almost every one of these labor cases. Mr. Carney, all the

way through the Court of Appeals in the Riviera case, was arguing that all the pickets did there was picket and if there was any action taken it was the action taken by the longshoremen and other people and the ship repair people who wouldn't go through their picket line. There was nothing wrong with these pickets, it was all with the other people.

Well, Judge Solomon and the Court of Appeals and the Supreme Court rejected — the Supreme Court didn't pass on that question—but it was rejected all the way through. I think it is just a fact of labor life that the Court could almost judicially notice that labor unions will normally respect a line established by the members of other unions walking up and down with banners, whether they say "Protest" or whether they say "Unfair," or whether they say "Strike."

The Court: No. I won't accept that as judicial knowledge. I asked this one witness if he had any reason to believe why work stoppage and work of this vessel by the servicing groups that were required ordinarily to service her, load her, had quit, and he said he had no reason to know. I will accept his statement as being his own view.

Mr. Mosser: I think, though, that on further questioning by your Honor he was asked, "Well, don't you think this had some influence?" and he said, "Yes, it probably did have some [111] influence in the decision of these workers not to"——

The Court: But I will not take judicial knowledge of it. I can take my own experiences in view just the same as the jury. We tell a jury in deciding

any question to take into view your ordinary daily experiences. But not judicial knowledge.

Mr. Mosser: I see the distinction and I think, perhaps, your Honor is correct in that.

I think the basic fact is that we have the fact that this picketing or boycott or protest or whatever you want to call it, did have the effect of tying up the ship. The coincidence of time, the reason reported by the stevedoring company that its men would not work because there was a line there, the attempt to get a tug and pilot who just wouldn't show up for the job—I think all of that tends to establish that it did have the effect of tying up the ship. The amount of damages and—I am not saying such as the Court would necessarily award damages on, but that isn't the purpose of this hearing. I think we made out a prima facie case that there was a substantial and continuing and quite possibly irreparable damage here as a result of the tying up of the vessel.

Now, I just want to cite one old case. I don't know whether your Honor is familiar with it. There haven't been too many recent cases on unfair restraints of trade [112] outside of the Sherman Act because——

The Court: Are you talking about common law?

Mr. Mosser: Common law. I just picked one old case out that was fairly close on the facts. That is Elder vs. Whiteside in the Federal Reporter, Volume 72, Page 724. That was a situation—the reason I picked it out, it is very close factually in a way. The charge was a conspiracy to prevent the loading

or unloading of a vessel except by certain labor that was acceptable to the people. Some of the defenses were that—there was no offense unless there was an interference with international or foreign commerce because of the antitrust laws of those days; that there was no actual damage shown to the ship and, therefore, no jurisdiction in the Federal Court. Since there was a crime there couldn't be a civil cause of action.

But the Court discussed at some length the common law conspiracy principle. The fact that you don't even have to prove necessarily overt acts as long as you prove the conspiracy and intent. Here I think we proved overt acts.

Finally he says:

"It is not necessary in this case to decide whether within the meaning of that statute the antitrust laws, the acts, and combinations against which the injunction is aimed would have been in restraint of trade or commerce among the several [113] states. This case was not based on that act. The questions now before the Court have been determined without reference to the above act and upon general principles that control the exercise of jurisdiction by courts of equity at the conclusion. Preliminary injunction must issue."

Even in the antitrust cases today I think it is common for the Court to look to what was an unfair restraint of trade at common law to decide whether there is a violation of the Sherman Act which prohibits unlawful restraints of trade.

So, I think the proven International conspiracy

participated in to the extent of the meetings of union chiefs in discussions here, making available to their men messages such as this: "A message to all waterfront workers" or stirring them up to action, the actual furnishing by a member of the Marine Cooks and Stewards' Union to the other members of these protest banners, the picketing or protesting itself, the fact that it is organized to the extent of having 12:00 o'clock to 6:00 shifts, and things of that kind, show that it is a concerted action and, I think, even counsel has admitted that there is a concerted nationwide, worldwide action here.

The Court: What was your volume of the Federal——

Mr. Mosser: That was 72 Fed. [114]

The Court: Thank you. I have the other.

Mr. Mosser: Now, I think as far as the substantive law, whether Norris-LaGuardia deprives the Court of jurisdiction, as I hastily read Judge Bryan's opinion I would say that it is adverse to my position. I think it is adverse to the decisions rendered by Judge Boldt and Judge Solomon.

He also decides that if there is a boycott it is a violation of the Taft-Hartley—or, actually, I am not sure he decided that. He says: "If you are contending it is under Taft-Hartley then you have to go to the Board." He didn't read the Benz case, the Riviera case in the Supreme Court as controlling——

The Court: As you interpret it.

Mr. Mosser: As I interpret it—or as controlling

on the Norris-LaGuardia question. In the Tacoma case I think it is fair to say that Judge Boldt did largely accept the position that it was controlling. I didn't mention before that that Tacoma decision is on the Ninth Circuit and has been before that Court at issue and argued for some months now without a decision.

So I readily concede that there is a difficult question to decide here. I think Judge Bryan was under pressure when he decided it and probably even more pressure than Judge Boldt who considered the matter for over a week end from Saturday on and did not render his decision until [115] Monday. Judge Solomon in his first decision, as I recall, took some two weeks before granting the injunction. An additional period of about a week before granting his second injunction, and the third one was granted, I think, the same day that the show cause order was returned.

But he considered at some length this question of whether our labor laws were intended to apply in the foreign situation.

Judge Boldt said—I am quoting from his opinion now——

"In my judgment interference in the United States port with the lawful performance of a lawful contract of a foreign vessel and crew of a friendly foreign power is conduct which amounts to an unlawful interference with international commerce and with the obligations of the nation under international law and the comity of nations. The point of our case is that because we have international obli-

gations involved here of paramount importance to the welfare and security of the nation, particularly, at this critical time in world history, the interference with wholly lawful activities of the commerce of a friendly foreign power are unlawful and, therefore, regardless of how well founded or grounded the reasons for employing that unlawful conduct, the [116] Court has the power and duty to restrain it.

There is a treaty of friendship in navigation between the United States and Liberia which provides that the vessels of each shall have the free access to the ports and territorial waters and harbors of the other."

That is cited in Judge Bryan's opinion.

The Court: I am acquainted with it.

Mr. Mosser: The reason that we have argued that the Benz decision is controlling in the Norris-LaGuardia case is that we conceive them both to be fundamentally designed to promote collective bargaining in American labor relations. They both have—if you read the declaration of purpose of the two acts, they are very similar. They recite the inability of the men to bargain for themselves; the need to promote collective bargaining, virtually identical. When they get to defining labor dispute their definitions are identical except for one word. The Taft-Hartley Act has "terms, tenure and conditions of employment"; the Norris-LaGuardia Act has just "terms and conditions of employment" in their definition that run about a paragraph long. That is the only difference between the two.

Now, if the Supreme Court found that the purpose and the language of the Taft-Hartley Act was not a specific intent of Congress to cover these foreign employment [117] situations—and that is what the unions are talking about—if they are talking about labor at all it is, "What will be the situation of employment aboard this foreign vessel?" Then if it didn't decide in that case that there was any congressional intent, where do you find it in the Norris-LaGuardia Act? Regardless of how the Court feels on the economics of this matter, we readily concede that there are competitive disadvantages of American ships with these foreign ships; though, frankly, if the unions are talking about raising wage scales, the Japanese ships, the English ships, the Italian ships, are the ones that have far lower scales than the Liberian vessel we are talking about which involves a great wage scale.

The Court: Yes. I read in the newspaper today there are two Japanese vessels in port, the Kokyo Maru and the——

Mr. Mosser: We regularly have those vessels calling. Each nation has its own peculiarities. The Greeks, largely because of the inflation and a high cost of living in that country, have wage scales at home that are fairly high worldwide and their shipping—seamen's wages rates reflect that, being the third highest behind the United States and Canada in the world. The Japanese have very low wage scales.

The Court: I don't like to interrupt your argument, I don't think that it is up to this Court to de-

termine what vessels—and I am sure that Jason, when he sailed in search [118] of the golden fleece, wasn't troubled with it. But it isn't for this Court to determine what Greece will pay or provide by its legislature or administrative acts a seaman aboard one of its vessels shall receive.

Now, as I view this problem before us, and as I view the problem of the complaint of the defendants, there is a subterfuge that American vessels, in order to escape and to be relieved of taxation of the United States and to be—I won't say "relieved," I will say—benefited by the union contracts concerning the seamen and the officers aboard those vessels, that this subterfuge has been carried out to the point where they are registering under foreign flags, they are setting up beyond the veil corporations in foreign countries whose main interest really lies in the United States.

Now, the testimony before this Court is that this vessel is about two years of age. She was constructed in Japan. There is a blank in the testimony of who purchased her from the shipbuilder. The testimony of the master and the first officer was that they had been aboard about two months. The record is entirely devoid of any American or United States ownership or interest in this vessel.

The testimony before the Court is that she is owned by a corporation of Panama. There is no testimony or any evidence as to the ownership of that corporation. [119]

The next point is that she is registered under the flag and in the country of Liberia. Registry means nothing.

The next point of interest is that her operators who, apparently, hold the interest of operating this vessel, are a corporation of London. The testimony further is that that corporation is managed by Greeks—I mean, citizens of Greece.

The testimony is that every man aboard her is a citizen, a national of Greece, except one party in the vernacular, Sparks, who is an Englishman.

Now, where in the record, so far as the plaintiffs' case is concerned, is there any ownership or direction of citizens of the United States?

Mr. Mosser: Well, certainly there is none. I think there is a distinction. I don't think this Court has to draw the line. I think on the one hand the case I told you about in the National Labor Relations Board where an American concern was really controlling the employment relations directly, not even keeping up a screen of separation, and was submitting to the Coast Guard and was employing United States citizens in its crew, clearly there that registry has no meaning and foreign incorporation of ownership has no meaning.

On the other hand, here we have a completely foreign situation which, I think, is way over on the other [120] side and where the foreign facts must be recognized.

Now, as I have said, if we are talking about wages and working conditions we have showed that there is a foreign standard here arrived at through collective bargaining and with unions involved that is a good wage scale for the country where the men come from. If we are talking about tax advantages,

where is that a labor dispute? Can a company in Oregon be picketed by other workers because they don't want it to locate a plant in Washington where there is a sales tax? Where does this enter in?

Sure, there are competitive advantages there, but if we believe in free trade at all isn't the use of the legislature and the democratic process and free competition on an economic plane sufficient and not the boycott or black list of somebody who happens to go somewhere where you don't like the tax policies? That isn't the purpose for which collective bargaining was designed.

Now, as I said, there may be a case in the middle and this New York case may have been it. But I don't think this is where you have a carefully preserved screen of foreign ownership with actual foreign corporations controlling the operation of the ship, even though ultimate stockholders may be American. There you run again into the problems which our Congress deals with. We have laws encouraging foreign investment by American citizens, actually giving [121] them tax advantages to put their money in foreign countries. Now, maybe this is wise and maybe it is unwise. Maybe it is wise from our national standpoint, at least, it benefits some groups to have low shipping rates. Maybe our wheat goes to the Orient because shipping rates are low and it wouldn't go to the Orient to compete with rice and other competitive products if the shipping rates were high. I don't blame these seamen. I know the problems of the one small tramp American company that operates out of Portland.

They are at a tremendous competitive disadvantage. But if we believe in free trade some of our people are always going to be at a competitive disadvantage with foreigners whose wages scales or other factors —maybe it is tax laws, maybe it is something else— give them a competitive advantage.

But that is a problem for Congress to deal with. It is an economic problem of national policy, not something that is the subject of collective bargaining and not something which is the subject of a valid labor dispute.

The Court: Would you care to give me your thoughts and suggestions as to what labor dispute exists between the unions who are attempting this process with either the management of the vessel involved or the seamen aboard her?

Mr. Mosser: Well, in the first place, our position, as I have explained, is that there is no labor dispute because of the foreign nature of the ownership of the crew, [122] vessel, registry, everything; that our labor laws defining labor disputes, namely, the Taft-Hartley Act and the Norris-LaGuardia Act, contain virtually the same definition and were not intended to control foreign situations, and the Supreme Court so held in the Benz case as to the Taft-Hartley Act.

Now, my second position would be that there has been no demands made here on this master, these owners, at all. They haven't tried to enter into any collective bargaining. There has been collective bargaining, Articles have been arrived at in accordance with the Greek standards that are perfectly satis-

factory and sensible to Greek citizens. I don't see where there is any legitimate labor dispute here.

The Court: Thank you very much. Mr. Carney.

Mr. Carney: If it please the Court, I think I will argue from here, your Honor, because I have my things spread out quite far.

The Court: You may. I see you have many papers there.

Mr. Carney: I would like to follow up for a moment the observations and summary that the Court made just a moment or two ago when you pointed out with respect to this ship being constructed just a couple of months ago and it being constructed in Japan and it being purchased by this corporation, or some corporation, and it being put in trade and commerce and there being a blank in the testimony in this case with respect to the ownership of the vessel and with respect to [123] the ownership of the corporation which is operating this vessel.

Now, in considering that I think that the Court was quite correct when he observed that the thing that this protest is about is what the Court called a subterfuge; that there are shipowners who are flying flags on their vessels using the flags as a subterfuge in order to gain some economic advantage and their greatest economic advantage that they are gaining has to do with their wages that they are paying and the working conditions on their ship and the expense of those.

The Court: I think I used the word "tax." And

that was ill-advised because that has nothing to do with the matter.

Mr. Carney: We didn't bring it in the case and it isn't in the case.

The Court: I think I probably used that in connection with some cases that I read that that was another advantage that people would have. It probably is an advantage but whether or not these seamen are interested in that advantage—let's forget about it.

Mr. Carney: Fine. But they are primarily interested with respect to the labor problem because to them it has two things: job opportunity; and, No. 2, the wages scales for doing the same work in the same trade, such as carrying cargoes of grain from Portland to the Orient and the other [124] ports throughout the world.

Now, with that thought in mind I think our first inquiry should be this: The plaintiff, and particularly the shipowner plaintiff, has come into this court and asked for equitable relief or asked for an injunction. But they are silent on the question that the Court has pointed out may well be crucial in this case.

It would seem to me that the burden of proof of those matters would be upon the person who has the knowledge of it. We have a presumption that when a person has information within their own knowledge and fails to produce it that it is to be presumed that if it were produced it would be against them.

Now, that isn't the exact wording of presumption, but I think——

The Court: That is the statutory construction.

Mr. Carney: Now, we asked their local agent who they have here, International Shipping Company, we asked their captain who was on the stand, we asked the captain of the vessel about it, and none of them knew who owned the company and neither do we. Indeed, in every case, your Honor, that I have run onto—and I have been through a few of them—we can never find out, apparently, or it is very difficult to find out who the owner of the vessel is and who actually is hiding behind the veil of the corporate existence in [125] Panama. It is a difficult thing to find out.

I think Mr. Mosser will remember that in the Riviera case we didn't find it out until a week or two later. Then he had a telegram, or something, from someone in London who said, "Tell him who the owner was." In that case it was a Panamanian corporation. So I don't think that the burden should be put upon the defendants, the unions in this case, to show who owns this. The plaintiff corporation, when they come into court and ask the extraordinary remedy of a court of equity, should provide that. I think it is their burden and I think that they have failed to meet it. Now, I think that was the first point I wanted to make with the Court.

Now, the second thing is that we have all studied or, at least, had a chance to read Justice Bryan's opinion which he dictated in New York, and I think that we find——

The Court: But he was dealing with such a different problem than we have.

Mr. Carney: I think the problem——

The Court: Plaintiffs here are twelve Liberian corporations and three Panamanian. The defendants are the NMU and SIU, both International Unions, representing substantially all unlicensed seamen employed on American flag vessels.

Mr. Carney: I don't see, your Honor, wherein it differs. Here we have the Liberian flagship as plaintiff or shipowner.

The Court: Well, now, are you willing to concede for [126] the sake of the record that the defendants served and before the Court in their respective capacities either as officers or as members of the union represent and stand in the position of all American unlicensed seamen employed on American flag vessels?

Mr. Carney: For the purpose of this hearing, we are willing to do that, your Honor.

The Court: All right. Fine.

Mr. Carney: I meant to say I am willing to do that in this hearing. I even believe that Mr. Coleman's testimony bore that out when he spoke with respect to his own union. He couldn't speak for all the other unions.

The Court: Well, you can have your own construction about it. I had a different one. But I accept your stipulation. I thought he had many reservations on it in his testimony.

Mr. Carney: Well, I think, your Honor, that the reservations were with respect to the word

"picket" as distinguished from the word "protest." That was the way I thought.

The Court: I don't want to make an issue about it, Mr. Carney. I am pleased to have your stipulation. Now we understand.

Mr. Carney: Now, I think that a reading on Page 23 of Judge Bryan's opinion appears, at least to me, that he does not—although there is a great deal said in the opinion [127] with respect to American shipping interests owning these vessels—that after he spoke of the definition of a labor dispute as defined in the Norris-LaGuardia Act and after, on Page 21, he said the term "labor dispute" has been broadly construed by the Court and called our attention to the leading cases on the matter, on Page 23 he states, beginning in the second sentence —he speaks in the first sentence as to whether or not the course of the union is wise, and he says that is entirely up to them as long as their activities concern terms or conditions of employment or the maintenance of such terms and conditions or the association or representation of persons in negotiating, fixing, maintaining, or seeking to arrange terms and conditions of employment, the case involved or grows out of a labor dispute. The courts are prohibited from interfering with such peaceful activities in the absence of fraud or violence.

Now, the particular thing——

The Court: May I just as a matter of inquiry at this point ask: What opportunity did the owners of the vessel involved have to meet any demands made by the American union?

Mr. Carney: They did not have any, your Honor. But as we know in a labor dispute situation there can be a labor dispute whether or not they are seeking to get employment or employment relationship with that particular employer.

In other words, there are a number of cases where [128] an employer is carrying on his business with substandard conditions.

The Court: Yes.

Mr. Carney: Whether or not the union is trying to get those jobs doesn't make any difference. The Courts have held that there is a labor dispute between that employer and union people engaged in the same trade or industry and that those union people would have a right to publish their dispute with the employer.

The Court: Well, of course, you have pointed out that you had no dispute, this was just a protest. What dispute under the state of the record did the participants either conducting or authorizing the carrying of these banners on the dock have?

Mr. Carney: The dispute is that there is a Liberian flag operator who we don't know who owns the ship. He is here in Portland taking up a cargo of grain for carriage to another port which is usually the work that has been carried on by American ships but which American ships cannot compete and get the charter at this time because of the foreign competition.

The Court: What about the two Japanese vessels in port today?

Mr. Carney: The situation of the Japanese ves-

sels, your Honor, comes back to what you said yourself with respect to [129] subterfuge. There has always been Japanese vessels which are Japanese flags, Japanese-owned and Japanese-manned, which carry cargoes to Japan, primarily, but also to other ports in the world.

The Court: That is right.

Mr. Carney: And they are, so to speak, bona fide foreign flags as distinguished from runaway foreign flags.

The Court: All right. Now, then, we have gotten down to the point that if this is a bona fide foreign ship you have no complaint.

Mr. Carney: If it is a bona fide foreign ship, that's true. If it is a bona fide foreign ship from Liberia we have no complaint.

The Court: Oh, no. If I were lucky enough I could own a small cruiser here on the Columbia and I could register at Grays Harbor. Does that make the owner of the vessel a resident of the State of Washington?

Mr. Carney: No, I don't imagine it would make him a resident of the state.

The Court: I think the flag that she carries is unimportant.

Mr. Carney: It is to one extent, your Honor.

The Court: The important part is who are the owners and the operators and whether or not they are trying to draw a subterfuge to evade the working conditions established by the [130] union with American flags.

Mr. Carney: If that be the issue, and it may well be——

The Court: A Japanese ship, if she wished and her owners wished, could certainly display the flag of Liberia and still not change her citizenship.

Mr. Carney: That's true. Then it would still be owned by a Japanese corporation or whatever corporate body they would have. But here when we come before the Court the owners of the vessel are secret and silent about who they are and whether they are American or not, I think that the presumption is against them. I think the burden is upon them and I think they haven't met it.

The Court: Well, I see your point.

Mr. Carney: And we made that point, your Honor.

I think there is another point upon which we ought to talk, and at first blush it will appear to the Court that this point may prove too much, and that is with respect to free speech. There is a line of cases that have held that labor unions in carrying on picketing and other such similar——

The Court: Well, you know, Mr. Carney, I have been through that mill before.

Mr. Carney: I know you have. But I want to apply it to this case, your Honor.

In any case where a union or anyone else claims free speech the Court, of course, will cast that aside if it [131] is found that their conduct is unlawful or has a wrongful purpose.

Now, I submit in this case that they have not shown any unlawful purpose; that they haven't

shown any wrongful conduct. The only thing that they have spoken of, the only thing that they have spoken of at all, has been restraint of trade and common law restraint of trade, not even statutory restraint of trade such as in the Sherman Act. I submit to the Court that the case that they cited you in the early Federal decision is prior to the enactment of the Clayton Act.

The Court: I recognized that.

Mr. Carney: I think that the conduct carried on by a labor union under the provisions of the Clayton Act is permissible conduct. In other words, if they are to seek an injunction in this court they must ask the Court to enjoin wrongful conduct. And I submit to the Court that they have not displayed any wrongful conduct as it is known in the law.

In the Benz case which he is relying upon, Judge Solomon found that there was wrongful conduct and he found that the wrongful conduct wasn't simply in the picketing of the ship, but he found it was in the purpose of the picketing. And the purpose of the picketing as found by Judge Solomon was that the union was attempting to make the employer, the shipowner, rehire a crew which went on strike when they shouldn't have. Now, that was the wrongful purpose which [132] gave basis to the damages and to the injunction in that case. But there is no such thing here.

The Court: May I ask you this? Just as a matter of advice, we have to use a purism, a pure situation. A Japanese vessel owned by Japanese citizens

flying the flag of Japan or any other registry carrying officers and crew under Articles signed with the nationality under the laws of the nationality of the ship, would you have any right to complain about working conditions, wages?

Mr. Carney: I missed the first part of what you said. Are you saying a Japanese ship with a flag of some other country?

The Court: I used the word "Japanese." Or, I could use the word "English" or any other.

Mr. Carney: But with a different flag than its own nationality?

The Court: Right.

Mr. Carney: I think, your Honor, the mere difference in the flag alone doesn't make any difference.

The Court: All right. Then we are even on that.

Mr. Carney: I did want to say a little bit further that we do—and although the evidence isn't clear in this case about it—some of the—the Liberian country, for example, has no inspection of the vessels and those type of regulations which make it easier to operate. But I think by and large [133] for the purpose of this case we can agree——

The Court: Let's carry on a little further. You have a vessel that is owned by Liberians and she is registered in Liberia and carries the Liberian flag and she is manned by officers and crew assigned under Articles of the law of Liberia, would you have any right to make a protest against her if she was in this port?

Mr. Carney: I think this, your Honor: I think

the answer is found in the definition of a labor dispute in the Norris-LaGuardia Act as relied upon by Judge Bryan, that whether or not you would have a dispute or protest with the vessel would depend if that vessel was coming into and going to engage in the trade and commerce which would be the same trade and commerce that the American sailors had been previously engaged in. If they were going to come in and compete in that commerce I think that the people engaged in that commerce would have a right to try to uphold their conditions in that trade and commerce. Now, do I make myself clear?

The Court: Yes, I understand your international thought about it.

Mr. Carney: In other words, the flag of one color or another I don't think makes a big difference. The big difference is that there is a certain amount of trade. There is only going to a be a certain amount of cargo moved in the [134] world. There are a certain number of seamen going to do that job.

The American seamen have been in that trade and are in that trade. They have established wage rates and working conditions in that trade.

Now, by some of these ship organizations organizing in other countries and using other countries' flags have avoided being under the collective bargaining agreement enjoyed by the American sailors. When those vessels come into that trade the American sailors would then have a dispute with them arising out of the conditions in the industry which

they are trying to protect. Now, that is what we contend.

The Court: Well, I can well understand the Unions' desire to set international policies, but it would seem to me that all things being bona fide that each country should operate under treaties with our Government and if there is to be any changes it should be with the Congress. I am willing to go along on the basis of your thought that the ownership of this vessel and the hiring of her crew, her officers and her crew, was in subterfuge and in violation of what the owners were subjected to the contracts of the unions involved. I will leave it on that basis and I accept your argument that there is possibly a blank in the plaintiffs' case as to the true ownership of the vessel involved. I will accept your [135] argument on that basis. But I cannot see how this Court can possibly be engaged in a dispute of the policies of one nation and of this nation as to its seafaring men.

Mr. Carney: I submit, your Honor, they are not involved in such a dispute.

The Court: Well, you said that it was up to the American seamen to raise their standards throughout the world. If I misunderstood——

Mr. Carney: Not throughout the world, your Honor; throughout the trade in which they are engaged in this port or in any other American port.

The Court: Were there any members of these unions that would have been a possible candidate as a seaman or officer aboard this ship when its Articles were signed in Rotterdam?

Mr. Carney: Not when their Articles were signed in Rotterdam on this particular ship. That's true, they weren't there. But the thing is, your Honor, we have got to understand that this ship is a tramp ship. When they sign Articles they sign Articles for two years or so and that vessel will go from place to place and take what charters they can find and what charters their company arranges for them.

The Court: By your same token, when she comes to the Port of Portland stevedores would refuse to load her because of a protest of seamen engaged in similar activities with members of the crew. When she got to Hong Kong, Hong Kong [136] could do the same. Where would she ever load?

Mr. Carney: Well, let's answer one thing at a time, your Honor. As far as this case is concerned I don't believe there is any evidence with respect to any connection between these unions and the Longshoremen's Union. They made a Longshoremen's Union a party, your Honor, and they dropped them.

The Court: Of course, you understand that that is one of the problems that this Court has to decide. Now, was it because of the change of the moon that ships service personnel refused to work her?

Mr. Carney: Well, I wouldn't think so, your Honor.

The Court: All right. Was it a change of the tide? Now, you can't ignore the fact that there have to be some correlations in American labor. When one faction of American labor takes a posi-

tion it is pretty well followed that other factions employing a servicing agent will respect that.

Now, that is what this Court has got to decide: What was the causation of the fact that this ship which has been here two days and has not been worked in this port by any servicing agent?

Mr. Carney: Your Honor, I think the burden of proof on that is on the plaintiff. They sued the Longshoremen's Union. They didn't serve them or. if they did, they dropped them from the complaint. Our testimony is and the evidence is undisputed that there was no relationship between the [137] defendant unions and the Longshoremen's Union. The Longshoremen's Union is not affiliated with them, they are not a member of their local Maritime group; they are a different union.

If the Court knows some of the history of that union—and they do not always work harmoniously with the other Maritime unions, as a matter of fact, they have a number of jurisdictional quarrels——

The Court: I don't have any doubt about that. I know their problems, their interrelation problems. What we are dealing with primarily is whether or not in New York the defendants were frank to admit that it was picketing. Here in an identical situation the defendants deny that it is picketing, deny that they were asserting any labor dispute; that they were merely protesting.

Now, how can you find a labor dispute when you deny that there is one?

Mr. Carney: We haven't denied there was a labor dispute, your Honor. We have not done that.

The witnesses said that they were not picketing. We spoke of this earlier, I think, that what they wanted to make clear and what their testimony showed was that it wasn't picketing in the sense that they were on strike and it wasn't picketing in the sense that when they have ordinary picketing they tell another union not to go through the picket line.

Now, that was what they were making clear to the [138] Court by using the word "protest" instead of the word "picketing." They were walking up and down in front of the ship with a banner, that is for sure. That's undisputed. That is the evidence in the case. The evidence was stipulated to as to what the banner said. The testimony was that as to what the quarrel is that these unions have with the so-called runaway flags with respect to their breaking down their conditions and depriving them of their jobs, that testimony is in the case and that is what the basis of their labor dispute is.

The Court: I think you pinpointed to me very well your position. Anything further?

Mr. Mosser: I think I will only cover one point, your Honor, because I think the rest of it has been brought out in your own questions and show an understanding of it. We would certainly disagree with this argument that we have the burden of coming into court and proving not only the ownership of the vessel by corporation but also of all the stockholders of that corporation.

Now, if that information is necessary we can probably get it. But they have never requested that we get it. They have never alleged that it is an

American-controlled and dominated corporation. It seems to me that if they are going to try and justify their picketing on the basis that this is a subterfuge and, in effect, some sort of a semilegal [139] attempt to avoid the tax and labor policies of this country that is being conducted by this plaintiff and the owners, that they have the burden of proving that.

Now, they adopted this resolution for this boycott, as the paper will show, way back the end of October, the first of November. They have been working up to this thing ever since. They have the shipping guide. This vessel came to Longview, Washington, before it came here. It's been in the river for awhile. They have made no effort to find out anything to support their theory that this is an American-controlled ship. Neither have they done anything to support their labor dispute argument, made any demands for negotiations concerning wages, hours, or working conditions, terms and conditions of employment aboard this ship. It seems to me they are throwing up screens to try and justify a nationwide boycott, when actually, if what they are concerned about is competition, as the evidence in this case has show*ed*, the competition is far more extreme from some of the principal Maritime nations such as Japan, Great Britain, and Norway, than it is from, at least, this particular ship manned with Greeks, so far as the evidence shows, managed and operated by Greeks, governed by Greek collective agreement conditions and in all respects satisfactory to the Greek citizens in accordance with the standards that they are accustomed to.

The Court: I will enter a decision at 9:45 in the morning.

(At 4:30 o'clock P.M. Court adjourned.)

(At 9:45 o'clock A.M. December 4, 1958, the Court rendered his opinion as follows:)

The Court: As the record shows, this Court completed taking of testimony and the receipt of evidence and that it heard the statements of counsel in connection with the matter of Fianza CIA Nav. S.A., a corporation, whom I understand to be a Panama corporation, and the other plaintiff, Frachten Treuhand, G.m.b.h., which I understand to be a corporation of Germany, against various unions, officials of the unions and members of the unions. There has been read into the record the parties who had been served at the time of the hearing, and plaintiff elected to go forward against those defendants who had been served. So the Court can only deal with reference to those defendants whom the record shows were served and counsel for the defendants having read in the record that they represented those particular people.

The Court was unresolved at the close of the hearing yesterday afternoon, late in the afternoon, and determined that it should have the advantage of the evening time to review the oral opinion which was entered by Judge Bryan in New York, I believe, last Saturday.

During the course of the trial there was considerable discussion among counsel and the Court as to the exact status of the plaintiffs as either owners,

operators or charterers of the vessel involved, being the—I believe she is the [141] Motorship Capetan Yemelos which is presently in this port, Portland, docked at a private dock. And she has been unserved and unserviced by any servicing maritime agency since the time there appeared in the vicinity of the dock certain members of the unions which have been served and are parties to this proceeding, who carried banners to the effect that they were protesting the practice which they claimed that this vessel and her owners and charterers were engaged in in attempting to develop policies of undermining and lowering the standard of wages, working conditions, of American seamen.

Great stress has been placed by the defendants upon the decision of Judge Bryan of New York of last Saturday, wherein he held that a labor dispute existed and that his court did not have jurisdiction to enter injunctive relief pendente lite. So this Court questioned counsel and tried to be attentive to the evidence produced as to determining whether or not the factual situation presented here in Portland was the same as the situation in New York.

Now, I read from Page 10 of the transcript of Judge Bryan's oral opinion wherein it states:

"The defendants"—being unions and members of the unions—"described the 'flags of convenience' or 'flags of necessity' which these ships fly as 'runaway flags' and assert they are a device by which the American interests who control the [142] plaintiff Corporations avert the necessity of entering into American collective bargaining agreements with the

crew of such vessels or the payment of American seamen's wages."

Now, that was the premise upon which Judge Bryan proceeded. There were multiple plaintiffs and multiple defendants in that matter before the Judge and it was all predicated, and as the evidence in this case shows that there was an international movement among international labor unions, if you will understand the meaning that I am placing on that, representing seamen throughout the world and, particularly, American seamen.

And that movement was advertised, as the evidence shows in this case, through the media of information, the trade journals of the union and the union members, that a four-day protest would be staged against this practice of vessels being and carrying what seems to be in the vernacular runaway flags; in other words, meaning that by subterfuge the true ownership and the true nationality of a vessel was disguised by having her registered and carrying the flag of some foreign country. And there seems to have been three countries that had been picked out that appear to be utilized by these so-called runaway flagships being under the Panamanian flag, Costa Rica, I believe, and, as we are dealing here, primarily, Liberia, or the Liberian flag. [143]

Now, I have reached the conclusion that in determining the relationship of these parties that what flag any given bottom carriers is not of importance. The question is: Who are the true owners, the true operators and the true charterers of any given ves-

sel upon any given voyage? If it should develop that the owners, operators, or charterers are engaged in some sort of a conspiracy or some sort of activity that tends to relieve them of their true obligation of dealing collectively with bargaining agents of American seamen, then the American seaman has had a wrong committed against him. If, on the other hand, the true ownership and the true operator or the true charterer of any given vessel on any given voyage is purely foreign, is not in a position, in any event, to deal collectively with any bargaining agent representing any American seaman, the American seamen have no complaint; they are not in the market.

As this Court pointed out yesterday, there were —at least, according to the Shipping News—two Japanese vessels being worked by the servicing agencies within the port without any difficulty. So the question was and it now resolves to determine whether or not the owner of this vessel involved is in truth and fact American or United States ownership which has devised a plan which would tend to defeat or to relieve them of their duty to bargain collectively with any given bargaining agent of any group of [144] American seamen. Secondly: Is there a labor dispute either within the meaning of the Norris-LaGuardia Act or Taft-Hartley Act or Oregon's Little Norris-LaGuardia Act? If there is a labor dispute, then the jurisdiction of this Court with reference to injunctive matters and labor disputes is greatly restricted and this Court acknowledged that.

If, on the other hand, there is no labor dispute, then this Court is obliged to determine whether or not either under common law or under State law or, perhaps, Federal law whether or not these individuals who have placed themselves in the vicinity of the dock where the ship is berthed and attempted to have been loaded have violated some wrong against the owners, the operators and the charterers of the vessel involved.

Now, the first plaintiff indicated is a corporation of Panama. There is no direct showing in the evidence as to who the stockholders of this corporation are, neither on behalf of plaintiff nor on behalf of the defendants who were required to show cause.

Now, this Court has found, it takes judicial knowledge of the laws of Panama, and is bound to take the presumption or the inference, at least, that all business transactions had are bona fide and in due course.

The second plaintiff in the case is a German corporation who is the charterer of the vessel on this given [145] voyage. Evidence shows that she came here under ballast and that she was to be stowed with a cargo of barley to be delivered to a port in Germany. There seems to be no quarrel, no contention made by the defendants that any of the stockholders of the German corporation are of American nationality. The evidence shows that the operator of the vessel is a corporation of England, or, at least, an organization of some type in England with its office in London. And the testimony of the mate and the master of the vessel indicate

that the principals of that corporation or organization, whatever it be, are of Greek nationality. The crew of this vessel on this voyage are of Greek nationality with the exception of one, the radio operator, who is an Englishman.

The crew and the officers some two months ago signed Articles of the voyage at Rotterdam. And the only testimony or evidence before the Court is that those Articles were in conformity with the laws of Greece and that the wage scale and the conditions, working conditions, of the officers and the crew were in conformity with the wages and working conditions established by the labor unions of Greece.

Now, there is no showing as to who the stockholders of this English organization or corporation are other than the oral testimony of these two officers that they were of Greek nationality. One other thing: The testimony shows that this vessel's keel was laid and she was launched and built [146] in Japan some two years ago. The record is absolutely devoid of any evidence on behalf of any of the parties that she was ever owned by American interests, she was ever chartered by American interests, or that she was ever operated by American interests with the one exception of the evidence of the port husband agent here in Portland who was hired, as he said, by wire, I think, or telegraph, some instructions from London.

So I am content to find on the record before me that this vessel is a foreign vessel; that she is owned, she is controlled, that she is operated by an entire foreign interest; that no American nor na-

tional of the United States has any interest in this voyage other than the sellers of the cargo.

Therefore, unlike the New York case, this Court is content to hold that this vessel is not a runaway flag; that she is operating when she came to this port under treaty approved by Congress; that there was no competition, and that there was no market for any American seaman as a member of her crew.

Now comes the question as to whether or not there is a labor dispute. Now, in the New York case the defendants were content to say that they were picketing and the Judge in his opinion in several instances refers to picketing or protest. In this case the defendants insist that there is no picketing; that this is just merely a protest. [147]

Somehow they heard about it and after members of the union had talked about it they asked for volunteers and some volunteers—the volunteers, some of whom are defendants, properly served and before this Court appeared at the dock and in the vicinity where the vessel is berthed, and simultaneous or practically so with the appearance of these protesters carried banners that they protested the ship and the working conditions and wages paid officers and crew, all servicing agents, marine servicing agents in the Port of Portland refused to have anything to do with this vessel.

Since this occurred she has been moored at the dock, she is unable to move, she is unable to be loaded. For all practical purposes she is a dead ship.

Now, the defendants in their evidence claim that they have no labor dispute with any of the crew

members nor with the owners of the vessel. There have been no demands made, there has been nothing sought by way of collective bargaining; they just simply appeared and ipso facto the vessel for reasons they do not know why became a dead ship.

I cannot find from any of the evidence in the case that there was any active conspiracy between any of the defendants before this Court to prevent the loading of this vessel; yet, on the other hand, this Court does find that members of the union appeared wearing banners in protest and that other members of other unions ceased and desisted in [148] performing their ordinary duties in connection with servicing and working the vessel in the port. So I find from the evidence that there is no labor dispute existing between any of the unions and its members before this Court.

I further find that this Court has jurisdiction of the parties on diversity. I further find that under the allegations and testimony it is true the defendants say that this protest is only going to last four days and I believe it's today or tomorrow which would be the fourth day. But as Judge Bryan pointed out in his case, it may be four days or it may be longer. The evidence in this case shows that since the time this vessel has not been worked she is suffering damages at the rate of $1500 a day, plus being assessed by reason of the fact that under a tariff adopted by one of the port facilities by reason of her failure to be worked or to be loaded she is being assessed $100 an hour for not removing herself from the dock.

So I find that this Court has jurisdiction under the $10.000 jurisdictional limitation. So it necessarily follows this Court having jurisdiction of the parties and its jurisdictional amount having been met that there is no labor dispute between these parties; that the action of the party defendants before this Court has prevented and has been an interference on the contractual rights of this vessel, her charterer, her owners and her operators with [149] other parties. And while I have sympathy for the position of the defendants that if the owners of this vessel had in some wise at one time been obliged to deal with these American seamen under our standards and then sought by a subterfuge to evade that, this Court would be one of the first to grant those American seamen such relief as it could, but this Court has found otherwise. And the only one that has been harmed in this transaction by reason of the activity of the defendants served and before this Court has been those defendants themselves.

I am constrained to say that, perhaps, they picked the wrong vessel in this case. So it will follow that a temporary injunction as prayed for in Plaintiffs' Prayer No. 2 as to the defendants before this Court and any parties acting in concert in connection with or under their direction shall be enjoined from committing the activities complained of from and after 12:00 Meridian today.

Counsel for plaintiffs may submit findings and appropriate order.

(At 10:15 a.m. this matter was adjourned.)

(At 3:10 p.m. December 4, 1958, the following matters were heard in the Court's chambers, there being present the Court, the Court Reporter, Mr. Mosser, Mr. Shoemaker and Mr. Carney:)

Mr. Carney: We went over these findings and language of the injunction and we are pretty much in agreement as to the form of that language. Of course, as the Court knows, the defendants in this case do not have to take exceptions to the findings——

The Court: I understand that.

Mr. Carney: ——to reserve any right of appeal, if we care to take one.

The Court: Right.

Mr. Carney: In order to complete the record to conform to the findings there are two or three facts which we are willing to stipulate to which we would like to present to the Court now.

The Court: You may read them in the record.

Mr. Carney: I think that what they are is that we are willing to stipulate to certain of the findings as being true.

Mr. Mosser: That's correct.

Mr. Carney: Mr. Mosser, do you want to tell us what those are?

Mr. Mosser: That would include the original Finding 15 [151] which has been stricken out and a special Finding 15 which has been inserted on a flyleaf. It concerns which of the unions were actually doing or having on their behalf done the patrolling at the vessel and which were not.

The Court: Yes.

Mr. Mosser: There is no direct testimony on some of these facts in the record, but we are both willing to stipulate to them.

The Court: Well, with the exception of each one of the witnesses who were called——

Mr. Mosser: Some of it is supported in the record and some of it is by stipulation.

The Court: All right.

Mr. Mosser: We are also willing to stipulate to Finding No. 19 which concerns the fact that the plaintiffs own, operate, charter other vessels that call at the Port of Portland and other ports within the jurisdiction of this Court, and to Finding 20, which is that the defendant would continue to patrol and protest against this M/V Capetan Yemelos and other vessels of the plaintiff unless restrained and enjoined from doing so.

The Court: Of course, I am not quarreling with your stipulation. I am willing to accept any stipulation of fact that Counsel will make. But I am wondering what the facts under the Findings 19 have to do with this dispute. [152]

Mr. Mosser: Counsel for the defendants has also agreed that in view of this stipulation it would be proper for an injunction to enjoin the defendants not merely from picketing the Yemelos but also from picketing other vessels — I may advise the Court that this is similar to what was done by Judge Boldt on the stipulation of counsel in Tacoma. It is partly designed to insure that the case will not become moot when this one particular vessel

on this one particular voyage departs. Because there is a continuing dispute here between the defendants and the plaintiffs on any future voyages.

The Court: Well, would it be Counsel's thought that this restraining order would be effective, assuming another vessel of plaintiff moved in the port tomorrow? Would this restraining order be against any activity along the nature as described in this case against that vessel?

Mr. Carney: If it were owned by the same corporation who is plaintiff in this case and if it were flying——

Mr. Mosser: And the same type of vessel; in other words, a foreign vessel with a foreign crew sailing under foreign Articles in international commerce.

The Court: Of course, the only reason that I could find any justification in connection with this order that was made was on the basis that she was a foreign bottom as distinguished from owners trying to evade some particular action.

Now, if I understand Counsel correctly in connection [153] with Findings 19 and 20, that it would be on the same basis and the same state of facts in this case——

Mr. Mosser: That is correct, your Honor. I don't think there is anything inconsistent. You have already found that these owners and charterers are foreign. In the form of the injunction itself as well as in the conclusion, if we are entitled to the injunction, we specify that they must be similar vessels of foreign operation.

The Court: Yes. "Owned, chartered, calling at this port, defendants will continue to patrol and protest and take similar action or other harassing action against other vessels of plaintiff of a similar nature." All right. I will go with it.

Just as a matter of interest, I understand there are vessels in the Port of Vancouver.

Mr. Carney: There are about five vessels in Portland, all of which had this picketing and only—this vessel is the only one that came to court about it. The picketing is continuing on the others.

The Court: Well, what about this Vancouver matter?

Mr. Mosser: I think there is one over there.

Mr. Carney: Yes. There is one in Vancouver.

Mr. Mosser: There are others in Seattle and Tacoma.

The Court: The Washington paper is trying to get ahold of me.

Mr. Carney: Of course, this Court has jurisdiction over the vessel in Vancouver. [154]

The Court: Pardon?

Mr. Carney: This court has jurisdiction over the vessel in Vancouver. At least, there is joint jurisdiction.

The Court: Within so many miles.

Mr. Mosser: One other thing that I would like to put into the record in line with your Honor's ruling, and that is that a $500 bond be posted under Rule 65. The plaintiffs are tendering into the registry of the Court the check of the International Shipping Company payable to the U.S. District

Clerk in that amount for the payment of such costs and damages as may be incurred or suffered——

The Court: Yes. I will go with that.

Mr. Mosser: ——by any of the defendants herein who are found to be wrongfully enjoined or restrained.

The Court: I don't suppose it is certified.

Mr. Mosser: No, it isn't, your Honor.

The Court: Well, the Clerk will be bothered about it until it is cashed.

Let the record show that I will accept it as the bond.

Mr. Carney: We have no objection to it.

(At 3:20 p.m. this matter was concuded.)

[Endorsed]: Filed April 13, 1959.

[Endorsed]: No. 16447. United States Court of Appeals for the Ninth Circuit. Leroy Hein, Stuart J. Masters, Lawrence Cox, Vincente Otiz, Ray H. Robinson, J. Sloan, Art Coleman, and Lew Cornelius, Appellants, vs. Fianza Cia, NA. S.A., a corporation and Frachten Treuhand GNBH, a corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: April 20, 1959.

Docketed: April 28, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 16447

LeROY HEIN, et al., Appellants,

vs.

FIANZA CIA, NAV. S. A., a corporation, et al., Appellees.

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY, AND DESIGNATION OF CONTENTS OF RECORD TO BE PRINTED

Come now LeRoy Hein and the other appellants herein, and for their statement of points upon which they intend to rely herein, said appellants adopt the statement of points set forth in the typewritten record forwarded from the United States District Court for the District of Oregon.

Said appellants designate for printing all of the record on appeal, excluding the original exhibits.

Dated April 27, 1959.

TANNER & CARNEY,
/s/ TOLBERT H. McCARROLL,
/s/ RICHARD R. CARNEY,
Attorneys for Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 28, 1959. Paul P. O'Brien, Clerk.

No. 16459

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RALPH MEYER,

Appellant,

vs.

IRVING I. BASS, Trustee in Bankruptcy of the Estate of Vensep, Inc., etc., Bankrupt, and DIVISION OF LABOR LAW ENFORCEMENT,

Appellees,

IRVING I. BASS, Trustee in Bankruptcy of the Estate of Vensep, Inc., Bankrupt,

Appellant,

vs.

RALPH MEYER,

Appellee.

OPENING BRIEF OF APPELLANT RALPH MEYER.

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IN THE

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OPENING BRIEF OF APPELLANT RALPH MEYER.

Specification of Errors.

1. That the court erred in its opinion [Tr. of R. p. 59] as stated therein that the payment of state taxes by the Assignee should have been subordinated to the payment of wage claims.

2. That the court erred in its opinion [Tr. of R. p. 60] as stated therein that the payments of fees to the Assignee and his attorney and expenses actually incurred during the administration of the insolvent estate should have been subordinated to the payment of wage claims.

3. That the Division of Labor Law Enforcement is not a proper party to object to the Assignee's disbursements, as the wage claims were filed under Section 64a(2) of the Bankruptcy Act.

4. That the Division of Labor Law Enforcement was not prejudiced by the Assignee's disbursements.

5. That the Assignee should not be surcharged for the disbursements made by him during administration of the insolvent estate.

Jurisdiction.

The dispute upon which this action is based was heard and decided orginally in the Bankruptcy Court. Both the United States District Court and the United States Court of Appeals for the Ninth Circuit have jurisdiction over this matter by virtue of Section 24a and b of the Bankruptcy Act (11 U. S. C. Sec. 47), which provides in part:

> "The United States courts of appeal . . . are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdiction in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise or reverse, both in matters of law and in matters of fact. . . ."

Facts.

Vensep, Inc., a California corporation, owned, as its sole asset, a restaurant and cocktail lounge located at 3816 South Sepulveda Boulevard, Culver City, California. [Tr. of R. p. 40.] Said business was operated by said corporation under a liquor license issued [Tr. of R. p. 41] by the California Department of Alcoholic Beverage Control (hereinafter for convenience referred to as "Department").

In connection with said operation, Vensep, Inc., incurred liability for taxes to the United States of America, to the California State Board of Equalization (hereinafter for convenience referred to as "State Board,") and to the California Department of Employment [Tr. of R. p. 41] (hereinafter referred to as "Department of Employment"). Vensep, Inc., also incurred liability for payment of wages to its employees. [Tr. of R. p. 42.]

On May 29, 1957, Vensep, Inc., being insolvent, executed to Ralph Meyer (hereinafter for convenience referred to as "Assignee") a General Assignment for benefit of its creditors. [Tr. of R. p. 40.]

Assignee took possession of the business of Vensep, Inc., inventoried the assets, ascertained that the reasonable market value of the furniture, furnishings, fixtures, and equipment of the restaurant and cocktail lounge amounted to less than the unpaid balance of the purchase price thereof. There being no purpose to be accomplished by retaining said property, and consequently increasing expenses to the estate, Assignee sold to the lessor, on June 25, 1957, whatever equity he could have claimed in or to said property for the sum of $300.00 cash plus a waiver of administration rent in the sum of $990.00 (being a pro-

ration of the $1100.00 monthly minimum, rental provided for by Vensep, Inc.'s lease). Concurrently with said sale, Assignee surrendered possession of the business premises to the lessor. [Tr. of R. p. 8.]

On July 8, 1957, Assignee sold the on-sale liquor license of Vensep, Inc., for the sum of $5800.00. [Tr. of R. p. 41.] On July 11, 1957, lessor purchased the merchandise and supplies of Vensep, Inc., for the sum of $960.08. [Tr. of R. p. 9.]

The Department refused to transfer the liquor license to the purchaser until the taxes due from the Assignor to the State taxing agencies had been paid. Therefore, as condition precedent to transfer of liquor license, Assignee paid the demands of the Department of Employment, in the sum of $1655.08, and the State Board, in the sum of $1746.30, which represented the indebtedness of Vensep, Inc., to said agencies. [Tr. of R. p. 41.]

Neither the Division of Labor Law Enforcement nor any of the wage claimants filed any claim or notice thereof with the Assignee. [Tr. of R. p. 34.]

In connection with taking possession, inventorying, safeguarding, and liquidating the assets, Assignee expended the reasonable sum of $612.32 in the following manner [Tr. of R. pp. 41, 42]:

Jack's Key Shops—change of locks	$ 19.17
I. Bales—inventory and adjustor services	73.68
Recordation, signs and files	16.40
Southern California Water Company administration utilities	6.70
Richard S. Johnston—insurance	105.27
Ralph Meyer—office expenses: clerical, secretarial, stamps, stationery, storage, telephone	141.10

Assignee paid to himself a fee of $423.70 or 6 per cent of the net realization from liquidation of the assets. [Tr. of R. p. 41.] The Assignee also paid the sum of $250.00 as attorney's fees to Dorothy Kendall.

After liquidation of the assets, on July 17, 1957, an Involuntary Petition in Bankruptcy was filed against Vensep, Inc.; adjudication was entered on August 16, 1957. [Tr. of R. p. 40.]

On April 28, 1958, the Division of Labor Law Enforcement, pursuant to Section 64a(2) of the *Bankruptcy Act,* filed a claim for $7662.85 in the bankruptcy estate on behalf of employees of Vensep, Inc. [Tr. of R. p. 23.] Said claim did not assert any priority under *California Code of Civil Procedure,* Section 1204 and did not assert any lien right under Section 67c of the *Bankruptcy Act.* [Tr. of R. p. 23.]

Issues.

1. Were the payments by Assignee to the Department of Employment and State Board proper?

2. Is the Division of Labor Law Enforcement prejudiced by the disbursements of Assignee's administration expense and fees?

3. May the Division of Labor Law Enforcement, having filed wage claims solely under Section 64a(2) of the *Bankruptcy Act,* object, as wage lien claimants, to Assignee's disbursements?

4. Should the Assignee be surcharged for payments made to the state taxing agencies which were required as a condition precedent to the transfer and sale of the liquor license?

ARGUMENT.

I.

A Liquor License Is a Privilege Granted, Controlled, and Regulated by the State.

A. There is no inherent right to sell intoxicants, and a license to sell intoxicants is a permit to do what is otherwise unlawful

Irvine v. State Board of Equalization, 40 Cal. App. 2d 280;

Moore v. State Board of Equalization, 76 Cal. App. 2d 758;

People v. King, 115 Cal. App. 2d Supp. 875;

Hansen v. State Board of Equalization, 43 Cal. App. 2d 176;

Saso v. Furtado, 104 Cal. App. 2d 759;

and the governing authorities may grant the privilege upon such terms and conditions as it may determine are proper.

People v. Jemnez, 49 Cal. App. 2d Supp. 739.

It is the type of property which the State, under its police power, has the power to control and regulate.

Cooper v. State Board of Equalization, 137 Cal. App. 2d 672.

And the constitutional right of a person to engage in business does not apply to one desiring to engage in the retail liquor traffic; but before so engaging, one must apply for a permit to the sovereign power, which power has retained to itself the right to permit or withhold the right altogether or grant the permit upon such conditions as it pleases.

Denton v. Vann, 8 Cal. App. 677.

The State has the exclusive right and power to . . . regulate the sale and purchase of intoxicating liquor.

California Constitution, Article XX, Section 22.

B. Because a liquor license is a privilege controlled and regulated by the State and granted upon the terms and conditions believed by the State, through its administrative agency, to be in the best interests of the public welfare, the requirement that taxes owed by a licensee to the State be paid as condition precedent to the transfer of the liquor license is a proper and reasonable exercise of the power to control and regulate.

Since 1955, the Department of Alcoholic Beverage Control (successor agency to the State Board in governing and administering liquor licenses) has required the payment of all taxes owed by any licensee which may have become due under the Alcoholic Beverage Control law, the Sales and Use Tax law, the Personal Income Tax law, the Bank and Corporation Tax law, or which may become due under the Unemployment Insurance Code. Any person becoming a licensee of a liquor license issued by the Department becomes one subject to this requirement of payment of taxes as condition to renewal or transfer of license and holds the license subject always to the trust impressed upon the value of the license for payment of such taxes, even as a mortgagor holds mortgaged property subject to the lien of the mortgage. This control would be proper by rule of the Department, even without express statute.

C. The Department refused to transfer the license until the taxes due to the State had been paid. This refusal of the Department was not only a reasonable exercise of its regulatory power, but was a benefit to the State in insuring collection of taxes.

The Assignee paid the taxes and thus realized a material value to the estate. Had the Assignee refused to make the payments of taxes, as required by the Department, the license could not have been sold and a substantial asset would have been lost or frozen. By payment of the taxes, an equity was saved.

II.

In the Interest of Public Welfare, the Department of Alcoholic Beverage Control Requires, as Condition to Transfer of License, the Payment of All Taxes Due to the State.

A. "The Department may refuse the renewal or transfer of any license when the applicant is delinquent in the payment of any taxes due under the Alcoholic Beverage Tax law, the Sales and Use Tax law, the Personal Income Tax law, or the Bank and Corporation Tax law, when such tax liability arises in full or in part out of the exercise of the privilege of an alcoholic beverage license, or any amount due under the Unemployment Insurance Code when such liability arises out of the conduct of a business licensed by the Department of Alcoholic Beverage Control."

California Business and Professions Code, Section 24049.

In many instances, permissive conditions in statutes are given mandatory meaning.

Goodman v. Board of Education, 48 Cal. App. 2d 731.

The work "may" may be mandatory

Carter v. Seaboard Finance Co., 33 Cal. 2d 564

and permissive words may be interpreted as mandatory where such construction is necessary to effectuate the Legislative intent.

California Trust Co. v. Bennett, 33 Cal. 2d 694;
Hochfelder v. Los Angeles County, 126 Cal. App. 2d 370.

B. 1. In enacting Section 24049 of the *Business and Professions Code* and broadening its terms (historically described hereinafter in Paragraph III B 3), the intent of the Legislature has always been to promote public welfare. Public welfare can well be safeguarded by insuring collection of taxes due to the State.

2. In addition to the inherent broad powers of regulation and control granted in the Constitution (Art. XX, Sec. 22), the Legislature expressly gave to the Department the power to insure the collection of taxes where the exercise of the liquor license privilege is involved. Collection of taxes is as important as levy of taxes; and the State has power to compel the collection.

3. The Department, honoring this, uses its power of regulation and control over renewal or transfer of liquor licenses by requiring (a) since 1955, the payment of State taxes, and (b) prior to 1955 (by the State Board), payment of sales and use taxes as condition precedent to transfer of a license.

4. The Assignee performed the condition precedent, and thus the liquor license was transferred to the purchaser, with a gross recovery of $5800.00 and a net recovery (after payment of taxes) of $2,398.62 to the estate—a recovery which could not have been had without the payment of taxes.

III.

California Business and Professions Code, Section 24049 Is the Latest Expression of the Legislature and, Therefore, Prevails Over and Is Paramount to California Unemployment Insurance Code, Sections 1701 and 1702 and California Revenue and Taxation Code, Section 6756.

A. When two laws upon a cognate subject, passed at different times, are inconsistent, the later is controlling.

Meyers v. Los Angeles County, 110 Cal. App. 2d 623;

Bank of America v. Fidelity and Deposit Co., 9 Cal. App. 2d 687.

In determining which of two acts relating to the same subject is controlling, the statute last approved, *particularly* if it be a special act applicable to the particular subject, controls on the theory that it is the latest utterance of the Legislature.

Pierce v. Riley, 21 Cal. App. 2d 513;

Coca-Cola Bottling Co. v. Feliciano, 32 Cal. App. 2d 351.

Where two inconsistent laws are enacted at the same session of the Legislature, the last one adopted prevails.

Trinity County v. Mendocino County, 151 Cal. 279.

Even when different provisions of a statute, all passed at the same time, cannot be reconciled, the one that comes last in point of position prevails

People v. Dobbins, 73 Cal. 257

the presumption being that the later part was last considered.

Alameda County v. Dalton, 148 Cal. 246;

In re Roberts, 157 Cal. 472;

In re Harrison Estate, 110 Cal. App. 2d 717.

B. The history of development of the statutes in question is as follows:

1. *Unemployment Insurance Code, Sections 1701 and 1702:*

a. The Statutes of 1935, Chapter 352, Page 1234, Section 46, the first expression on the point, provided that the unemployment insurance tax and unpaid wage claims arising pursuant to *California Code of Civil Procedure,* Section 1204 ranked equally for priority of payment from an insolvent.

b. The Statutes of 1945, Chapter 568, Page 1107, Section 2, amended the earlier Section and provided that the unemployment insurance tax was subordinate to the payment of unpaid wage claims arising pursuant to *California Code of Civil Procedure,* Section 1204.

c. The Unemployment Insurance Code was complied as a separate code in 1953 and embodied the 1945 statute without any change whatsoever; and Chapter 568, Section 2, hereinabove referred to, became the Code Sections 1701 and 1702. Therefore, since 1945, the *general rule* in the State of California has been that, in cases of insolvency, unpaid wage claims arising under *California Code of Civil Procedure,* Section 1204 must be paid prior to the Department of Employment tax claims.

2. *Revenue and Taxation Code, Section 6756:*

a. The Statutes of 1941, Chapter 767, Page 2314, Section 3, enacted on June 21, 1941, provided that in case of insolvency the sales and use tax due was subordinated to the payment of unpaid wage claims arising pursuant to *California Code of Civil Procedure,* Section 1204. Therefore, since June 21, 1941, the *general rule* in the State of California has been that, in cases of insolvency, unpaid wages must be paid prior to the State Board claims.

3. *Business and Professions Code, Section 24049:*

a. The Statutes of 1941, Chapter 935, Page 2521, Section 1, enacted on July 3, 1941, provides: ". . . the Board may refuse any license when the applicant is delinquent in payment of any taxes owing under this act, the Retail Sales Tax Act of 1933, as amended, or the Use Tax Act of 1935, as amended . . ."

b. The Statutes of 1953 repealed Chapter 330 of the 1955 Statutes, as amended, and, by Chapter 152, enacted the Alcoholic Beverage Control Act. Statutes of 1953, Chapter 152, Page 984, Section 24049, became Section 24049 of the *Business and Professions Code.*

c. The Statutes of 1955, Chapter 1848, broadened *Business and Professions Code,* Section 24049 to include State taxes due under the Personal Income Tax Law, the Bank and Corporation Tax Law, and the Unemployment Insurance Code liability.

d. The Statutes of 1957, Chapter 553, added amendments which resulted in the present code section (paragraph II A, *supra*).

C. Thus, *Business and Professions Code,* Section 24049 clearly appears as the latest and, therefore, controlling expression of the Legislature for the reasons that with respect to:

1. The unemployment insurance taxes: The amendments to *Business and Professions Code,* Section 24049 by the Statutes of 1955 and 1957, which provided for payment of the Department of Employment claim as condition to transfer of license, impliedly repealed, with respect to liquor license businesses, the Statutes of 1945 (codified unto *Unemployment Insurance Code,* Sections 1701 and 1702), which generally subordinated the Department of Employment to the wage lien claimants.

2. The sales and use taxes: Statutes of 1941, enacted on July 3 (Paragraph B 3 a herein), which provided for payment of the State Board claim as condition to transfer of license, impliedly repealed—with respect to liquor license businesses—the Statute of 1941 enacted on June 21 (Paragraph B 2 a herein).

D. Therefore, if for no reason other than the fact that the right to compel payment of taxes due to the State as condition of transfer of license was made law *subsequent* to the establishment of priorities to wage lien claimants, the propriety and necessity of said payments by Assignee is uncontroverted and must be allowed.

IV.

California Business and Professions Code, Section 24049, Applying to a Specific Class, Prevails Over and Is Paramount to California Unemployment Insurance Code, Sections 1701 and 1702 and California Revenue and Taxation Code, Section 6756.

A. A special statute controls over the general

In re Shull, 23 Cal. 2d 745

and specific acts of the Legislature must be held to be controlling over prior existing general statutes

Buena Vista Water Storage District v. Shields, 126 Cal. App. 241.

Even though a general statute may be enacted later, it will not repeal by implication a former statute which is special or limited in application.

Division of Labor Law Enforcement v. Moroney, 28 Cal. 2d 344.

Although the general statute standing alone may include the same matter as the special act, thus conflicting with it, the special act is considered as the exception to the general, *whether enacted prior or later,* unless the special is repealed in words or by necessary implication.

In re Williamson, 43 Cal. 2d 651.

Even though the general statute is later, the special act will prevail in its application to the subject matter so far as coming within its particular provisions.

Ryder v. Los Altos, 125 Cal. App. 2d 209.

B. In our case, there are two general statutes (*Unemployment Insurance Code,* Sections 1701 and 1702 and *Revenue and Taxation Code,* Section 6756) which give, in

cases of insolvency, priority of payment to employees claiming under *California Code of Civil Procedure,* Section 1204 for unpaid wages, superior to payment to the State of unemployment insurance taxes and sales and use taxes, respectively. These statutes apply whether the insolvent operated a retail food market, a furniture store, a shoe store, a dress shop, or any other business whatsoever, *excepting* a business operating with a liquor license issued by the State.

C. Thereafter, the Legislature enacted a special act (*Business and Professions Code,* Section 24049), which applied only to liquor license establishments. This act, applying to one specific group, type, or class—with respect to that particular group, type, or class only—repeals and modifies the general statutes, which grant the top priority to the wage lien claimants. It is true that this special act, applying to liquor license establishments only, was enacted later than the general statutes, but even had it been enacted earlier, it must still prevail under the established law that the special is the exception to the general and prevails as to the subject matter coming within its particular provisions (*In re Williamson, Ryder v. Los Altos, supra*).

V.

Under Assignments for Benefit of Creditors, the Claim of the United States of America Must Be Paid Prior to Payment of Any Other Creditors.

A. The claim of the United States of America is paramount to all others, excepting perfected liens.

> "Whenever any person indebted to the United States is insolvent . . . the debts due the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor

having sufficient property to pay his debts makes a voluntary assignment thereof . . ."

31 U. S. C. A., Section 191 (Revised Statutes, Section 3466).

In order to establish priority over the United States of America, there must be in existence a lien claim which has been perfected. The lien must be attached to certain property by reducing it to possession; and where a town's tax lien and the Federal tax lien are general and the taxpayer is insolvent, the Federal tax lien has priority.

United States v. Gilbert Associates, Inc., 73 S. Ct. 701.

Where there were wage claimants of an insolvent corporation which owed Federal taxes and which had executed an assignment for benefit of creditors, the wage claimants did not have,—under *California Code of Civil Procedure,* Section 1204 any specific and perfected lien at the time the government's priority under Section 191 arose; and, thus, the wage claimants were not entitled to priority over the government. In order to have had such priority, the lien must have complied with the following standard: it must be definite as to indentity of lienor, as to the amount of the lien, and as to the property to which it attaches.

United States v. Division of Labor Law Enforcement, 201 F. 2d 857.

B. An assignee for benefit of creditors accepts the trust estate as a trustee for the United States of America, and must not pay any debts without first paying the claim of the United States of America. Any Assignee who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and

pays the debts due to the United States of America from such person or estate shall become answerable in his own person and estate to the extent of such payments for the debts so due the United States of America, or for so much thereof as may remain due and unpaid.

31 U. S. C. A., Sec. 192 (Revised Statutes 3467); *Lewis v. United States,* 92 U. S. 618.

C. The United States of America had a claim against Vensep, Inc., in excess of $7,000.00. The Assignee took the assets—and the cash which represented proceeds of liquidation of the assets—under the trust imposed by Section 191 subject to the reasonable disbursements necessary to accomplish the marshalling, conservation, preservation, and liquidation of the assets. The United States of America has not complained of nor objected to the payments required to be made by the Assignee to the State taxing agencies nor to the reasonable disbursements by the Assignee in connection with administration by him of the assigment estate.

VI.

The Wage Claimants Were Not Prejudiced by the Assignee's Disbursement of Moneys.

A. Under assignments for benefit of creditors, wage lien claims are superior to Assignee's fees and expenses and subordinate to the United States claims.

1. When bankruptcy proceedings have not intervened, priority wage claims under *California Code of Civil Procedure,* Section 1204 constitute liens on the assets of an assignment estate superior to the fees and expenses of an Assignee for benefit of creditors,

Division of Labor Law Enforcement v. Stanley Restaurants, 228 F. 2d 420

but the claims of the United States of America are superior to the statutory liens of the wage claimants.

> *United States v. Division of Labor Law Enforcement, supra.*

This applies to general assignments only and not to cases arising under the Bankruptcy Act.

2. The whole of the assignment estate moneys was payable to the United States. The gross receipts in the assignment estate amounted to $7,061.83. The claim of the United States amounts to in excess thereof. Had the Assignee not expended one cent for expense, payment of taxes, or fees, all of the receipts of the assignment estate being held by him as trustee for the United States, would necessarily have been paid by him to the United States. Under no condition, could there have been any funds remaining for the payment to any of the wage claimants whose claims arose under *California Code of Civil Procedure* Section 1204. Therefore, the said wage claimants, not being prejudiced by Assignee's disbursements, are not proper parties to object to said disbursements, or any portion thereof.

B. In bankruptcy, wage lien claims asserted under Section 67c of the *Bankruptcy Act* are subordinate to administration expenses, under Section 64a(1) of the *Bankruptcy Act,* and wages entitled to priority, under Section 64a(2) of the *Bankruptcy Act.*

> 1. ". . . though valid against the trustee under subdivision b (employees' liens under *California Code of Civil Procedure,* Section 1204)* of this Section,

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*Added.

statutory liens . . . on personal property not accompanied by possession thereof . . . shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of Section 64 of this Act . . ."

Bankruptcy Act, Section 67c;

California Department of Employment v. United States, 210 F. 2d 242.

2. Although *California Code of Civil Procedure,* Section 1204 gives a statutory lien to prior wage claimants which may survive bankruptcy

Cheek v. Division of Labor Law Enforcement, 166 F. 2d 429

these are not perfected liens so as to entitle them to be paid before the debts specified in Section 64 of the *Bankruptcy Act;* and, therefore, liens claimed pursuant to *California Code of Civil Procedure,* Section 1204 must be paid after administration expenses and fees (*Bankruptcy Act,* Sec. 64a1) and *after* the wages which may be entitled to priority in payment (*Bankruptcy Act,* Sec. 64a2).

3. Because the lien position of the wage claimants is subordinate to payment of administration expenses and prior wage claims, the objecting wage claimants are not prejudiced by Assignee's expenditures. The State taxes *had* to be paid in order to realize an asset. The remaining moneys, under bankruptcy, amounted to a sum far less than the expenses to be allowed under Section 64a(1) of the *Bankruptcy Act* and the prior wage claims filed under Section 64a(2) of the *Bankruptcy Act.* Thus, inasmuch as no funds could under any circumstance have remained for payment to wage lien claimants, they are not proper parties

to object. Even had the Assignee not disbursed any funds, this would have been true.

C. The wage claimants, claiming under Section 64a(2) of the *Bankruptcy Act,* cannot also assert a lien under Section 67c of the *Bankruptcy Act.*

1. The Division of Labor Law Enforcement filed (Claim No. 27 on file herein), on behalf of Vensep, Inc., employees, claims for unpaid wages amounting to $7662.95. Said claim was filed under Section 64a(2) of the *Bankruptcy Act* [see Petition *re* Objections to Report and Account of Assignee for Benefit of Creditors and for Order to Show Cause thereon, Tr. of R. p. 23].

The priority under *Bankruptcy Act,* Section 64a(2) is a priority expressly granted by the provisions of the Bankruptcy Act itself and completely separate from and independent of the California State law.

2. Although statutory wage liens under *California Code of Civil Procedure,* Section 1204 may be preserved and may survive bankruptcy (*Cheek v. Division of Labor Law Enforcement, supra*), a claim of lien must be asserted to preserve the lien.

Bankruptcy Act, Sec. 67b.

No such claim was asserted by the Division of Labor Law Enforcement until now.

3. The Court will preserve a statutory lien to do equity, not to do inequity. In *Cheek v. Division of Labor Law Enforcement* (*supra*), a debtor had executed a General Assignment for benefit of creditors, and wage claimants filed claims with the Assignee. Within four months thereafter, a petition in bankruptcy was filed and the wage

claimants could not qualify under the priority granted by Section 64a(2) of the *Bankruptcy Act*. They filed claims in the bankruptcy proceedings asserting their statutory lien under *California Code of Civil Procedure,* Section 1204. In order that equity could be accomplished, the Court held that the lien greated by *California Code of Civil Procedure,* Section 1204 survived bankruptcy.

Thus, payment could be had by labor claimants who could not qualify under Section 64a(2) of the *Bankruptcy Act* and who otherwise would not have been paid. The Court so decided because it would have been inequitable to penalize labor claimants whose right to priority payment would have been lost by the passage of time. The facts are completely different in our case, where no claim was filed with the Assignee, where the Assignee in good faith made disbursements, and where to find a survival of a lien paramount to the Assignee would work an inequity without benefit to the wage claimant.

4. The priority granted by the Bankruptcy Act is separate and different from the priority accorded to the statutory lien created by *California Code of Civil Procedure,* Section 1204. Inasmuch as the Division of Labor Law Enforcement failed, wholly and completely, to assert any priority under *California Code of Civil Procedure,* Section 1204, it cannot now change positions and attempt to revive the statutory lien by asserting it at this time. But even if the statutory lien were to be revived, it would be subordinate to the claims filed under Section 64a2 of the *Bankruptcy Act;* and, thus, subordinate to administration fees and expenses.

D. Wage claimants must take a position—and they have. They have filed under Section 64a(2) of the *Bank-*

ruptcy Act because they can qualify under said Section, and said Section is entitled to payment before any payment of statutory liens. Thus, the wage claimants have elected to file under the rights granted by the provisions of the Bankruptcy Act. No formal claims to a statutory lien were made by the wage claimants herein as in *Cheek v. Division of Labor Law Enforcement* (*supra*).

1. It is manifestly impossible to assert inconsistent positions; but assuming that the wage claimants are permitted to assert for the first time a statutory lien under Section 67c of the *Bankruptcy Act,* that lien must take its position under the Bankruptcy Act, which is subordinate to Section 64.

2. The Division of Labor Law Enforcement cannot say, "Under the law of General Assignments, we were paramount to the Assignee; and under the law of bankruptcy, we are paramount to the United States." The Division must assert its position consistently and claim either under the law of General Assignments, in which case it is subordinate to the United States, or under the Bankruptcy Act, in which case it is subordinate to administration fees and expenses. It cannot claim squarely under Section 64 of the *Bankruptcy Act* and also claim under Section 67c of the *Bankruptcy Act.* Having chosen to file and assert claims under said Section 64, the Division has made its election.

3. Having filed under Section 64 of the *Bankruptcy Act,* which is a proper Section, the Division may not object to the payment of the assignee's administration fees and expenses because such right is not granted to claimants under said Section.

E. As the wage claims were filed under Section 64a(2) of the *Bankruptcy Act* [Tr. of R. p. 23], only those wages, ". . . which have been earned within three months before the date of the commencement of the proceedings . . ." have priority over the general creditors of the bankrupt estate. Here, the Division of Labor Law Enforcement filed claims in the sum of $7662.85 under Section 64a(2) of the *Bankruptcy Act,* which represents the amount earned by wage claimants ninety (90) days preceding the assignment for the benefit of creditors.

Therefore, in order for the Division of Labor Law Enforcement to assert any priority of payment in the bankruptcy proceedings it can only claim the wages earned ninety (90) days prior to the filing of the involuntary petition in bankruptcy, *i.e.,* July 17, 1957.

F. If the Assignee had not sold the liquor license and it had passed to the bankrupt's estate, the Trustee in Bankruptcy would have been governed by the same law applicable to the Assignee and the Trustee would have been unable to transfer said license without paying the state taxes as a condition precedent thereof.

In re Bay Ridge Inn, 94 F. 2d 255.

Therefore, the Division of Labor Law Enforcement was not prejudiced by the payment of state taxes by the Assignee because the *net* recovery to the bankrupt's estate would have been identical whether the Assignee or the Trustee in Bankruptcy sold the liquor license.

VII.

The Assignment for the Benefit of Creditors Could Not Operate to Transfer the Liquor License to the Assignee. The Labor Claims Can Only Be Asserted Against the Proceeds of the Sale of the Liquor License.

A. A provision in the constitution of a stock and exchange board, whose members are limited in number, and elected by ballot, that a member becoming insolvent, may assign his seat to be sold, and the proceeds shall, to the exclusion of his outside creditors, be first applied to the benefit of the members to whom he is indebted—the purchaser not becoming a member, nor having right to transact business in the board, until he shall be elected by ballot—is not in violation of the bankruptcy act, since upon the bankruptcy of a member, the proceeds of a sale of his seat are not general assets which pass to his assignee.

Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264, affirming Fed. Cas. No. 6975, 2 Sawy. 255, 10 N. B. R. 54, 1 Am. Law. T. Rep., N. S., 354.

A bankruptcy trustee is not entitled to proceeds derived from selling the bankrupt's membership in the New York Stock Exchange until the bankrupt's dues to, and debts within, the Exchange have been determined by the Exchange's committee and deducted.

In re Gregory (C. C. A. N. Y. 1909), 174 Fed. 629, 98 C. C. A. 383, 27 L. R. A., N. S., 613;

In re Currie (C. C. A. N. Y. 1911), 185 Fed. 263, 107 C. C. A. 369;

Solinsky v. New York Stock Exchange (D. C. A. N. Y. 1919), 260 Fed. 266.

An analogy may be drawn from the foregoing authorities to the case at bar. The courts have held, as hereinbefore cited, that debts owed to fellow members of a stock exchange are to be paid and deducted from the gross sum realized from the sale of a seat on the exchange, and the proceeds thereof, after such deductions, are available to general creditors of the assignor or bankrupt. Thus, the seat on the exchange is charged, under the rules of the stock exchange, with a liability which must be paid in order that any value whatsoever may be affixed thereto on a subsequent sale for the benefit of outside creditors.

Here, the Department of Alcoholic Beverage Control has, pursuant to statute, affixed upon a liquor license the liability of state taxes to be paid before a transfer of the license will be allowed. Without performance of this condition precedent, the liquor license has no value and no creditors, preferred or general, can have any claim upon the value of the license other than the proceeds of the sale after deducting the state taxes.

B. It is axiomatic that in order for there to be preferences or priority for payment from a fund, that there must be an existing fund to which claims can be made.

A general assignment for the Benefit of Creditors carries with it only such property as the assignor is legally capable of transferring or assigning.

> *Peterson v. Ball,* 211 Cal. 461, 296 Pac. 291, 74 A. L. R. 187, followed in 211 Cal. 729, 296 Pac. 300.

A liquor license is a permit by the state to do that which would otherwise be unlawful.

> *Irvine v. State Board of Equalization,* 40 Cal. App. 2d 280, 104 P. 2d 847.

The State has absolute power to prohibit or allow the sale or manufacture of intoxicating liquors.

Foster v. Kansas, 5 S. Ct. 8, 97, 112 U. S. 201, 28 L. Ed. 629, 696.

State of Kansas v. Bradley, 26 Fed. 289.

In *Richards v. Geiger,* 39 App. D. C. 278, the court said that a license to sell intoxicating liquors is a mere permit, personal to the licensee, and is not transferrable unless the right is expressly conferred by statute and then only upon compliance with the provisions of the statute relating to the transfer.

In the Assignment to the Assignee by Vensep, Inc. [Tr. of R. p. 13], it is expressly provided that the Assignee is appointed the agent of the Assignor for the purpose of filing an application for a permit for the sale of the liquor license, and the proceeds of the sale thereof are assigned for the benefit of creditors.

It is the general rule that the rights of creditors are governed by the deed of assignment.

Harrington v. Taylor, 176 Cal. 802, 169 Pac. 690.

Applying this rule, neither creditors of the assignor nor the assignee, can claim any property not *in fact* conveyed by the deed of assignment.

Wilhoite v. Bryant, 78 Cal. 263, 20 Pac. 561.

In the case at bar, the liquor license, as such, never became an asset or property of the insolvent estate of Assignee due to (1) the express terms of the Assignment, and (2) the legal impossibility of assigning or transferring the said liquor license without the consent and ap-

proval of the State of California through its duly appointed agency, the Alcoholic Beverage Control Board.

In the Findings of Fact [Tr. of R. p. 41], made by Honorable Joseph J. Rifkind, it is stated, "That the Department of Alcoholic Beverage Control required payment of said sums (state taxes) as a condition precedent to the transfer of said license." Therefore, the only fund or asset which could be claimed by any creditor of the Assignor, arising from said liquor license, is the proceeds of the sale from which the state taxes were subtracted prior to inclusion in the insolvent estate.

There is no valid question or issue as to the priority or preference of claims against the estate assigned for the benefit of creditors, as there could be no fund for distribution among creditors, arising from the fact that the Assignor possessed a license for the sale of alcoholic beverages, without the approval of the state licensing authority for the transfer and sale of such license. The consent of the Department of Alcoholic Beverage Control was conditioned upon the payment of state taxes and, consequently, only the proceeds of said sale, minus the state taxes demanded by the state licensing authority pursuant to *Business and Professions Code,* Section 24049, can be claimed by creditors of the Assignor. The said liquor license could only have a monetary value as an asset of the insolvent estate based on its market value minus the state taxes required to be paid prior to its transfer.

Business and Professions Code, Section 24049, cannot be construed other than as establishing the mode of realizing an asset for an insolvent estate by payment of state taxes before there is a fund to which priority can be asserted by creditors of the Assignor. A statute will be

construed so that it will be reasonable and consistent with other expressions of the legislature concerning related matters.

Los Angeles County v. Legg, 5 Cal. 2d 348, 55 P. 2d 206.

VIII.

The Assignee Should Not Be Surcharged for Expenditures Made Pursuant to Law and in Good Faith.

There has been no allegation made by either the Trustee or the Division of Labor Law Enforcement that the payments to the state by the Assignee were made fraudulently or in bad faith. There is no issue as to the fact that such payments were made in good faith by the Assignee and pursuant to a valid and existing statute (*Business & Professions Code,* Sec. 24049).

As the trustee in bankruptcy could not have realized any sum in excess of that which the Assignee realized on the sale of the liquor license for creditors, and the payments by the Assignee of the state taxes were made in good faith and pursuant to law, there is no basis to personally hold the Assignee liable for a sum of money which was never a part of the insolvent estate.

Respectfully submitted,

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No. 16459

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RALPH MEYER,

Appellant,

vs.

IRVING I. BASS, Trustee in Bankruptcy of the Estate of Vensep, Inc., etc., Bankrupt, and DIVISION OF LABOR LAW ENFORCEMENT,

Appellees.

IRVING I. BASS, Trustee in Bankruptcy of the Estate of Vensep, Inc., Bankrupt,

Appellant,

vs.

RALPH MEYER,

Appellee.

REPLY BRIEF OF APPELLEES AND CROSS-APPELLANTS.

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REPLY BRIEF OF APPELLEES AND CROSS-APPELLANTS.

Specification of Error.

1. That the Court erred in denying the Trustee's motion to dismiss the petition for review filed by Appellant herein seeking a review of the Referee's Order of October 23, 1958. [Tr. of R. p. 61.]

Jurisdiction.

Appellate jurisdiction over the instant matters exists by virtue of the provisions of Section 24a of the Bankruptcy Act (11 U. S. C. Sec. 47a).

Facts.

The material facts set forth in Appellant's Opening Brief are not controverted. Reference is made herein only to those facts which relate to the question of the timely filing of the petition for review filed by Appellant from the Referee's Order of October 23, 1958.

The Order of the Referee surcharging Meyer in the sum of $4,437.40 was entered on October 23, 1958. [Tr. of R. p. 39.] Meyer did not file his petition for review with the Referee until November 24, 1958 [Tr. of R. p. 29], some thirty-two days after the entry of the Referee's Order. On said 24th day of November, 1958, Meyer additionally filed a petition with the Referee seeking an extension of time for his filing of a petition for review. [Tr. of R. p. 46.] Meyer's petition for an extension of time was denied by the Referee. [Tr. of R. p. 46.] The Trustee moved the District Judge to dismiss Appellant's petition for review on the ground that it was not timely filed. [Tr. of R. p. 56.] In his Order of March 27, 1959, the District Judge denied the Trustee's motion. [Tr. of R. p. 61.]

State Statutes Involved.

California Code of Civil Procedure, Section 1204

"When any assignment, whether voluntarily or involuntarily, or whether formal or informal, is made for the benefit of creditors of the assignor, or results from any proceeding in insolvency . . . commenced against him, or when any property is turned over to the creditors of a person . . . or trustee for the benefit of creditors, the wages and salaries of . . . servants, clerks, laborers, and other persons, for personal services rendered such assignor . . . within 90 days prior to such assignment, or the taking over of such property . . . and not exceeding six hundred dollars ($600) each, constitute preferred claims and liens as between creditors of the debtor, and must be paid by the trustee, assignee or receiver before the claim of any other creditor of the assignor . . . whose property is so turned over. . . . The trustee . . . or assignee for the benefit of creditors shall have the right to require sworn claims to be presented. . . ."

California Business and Professions Code, Section 24049

"The department may refuse the renewal or transfer of any license when the applicant is delinquent in the payment of any taxes due under the Alcoholic Beverage Tax Law, the Sales and Use Tax Law, the Personal Income Tax Law, or the Bank and Corporation Tax Law, which such tax liability arises in full or in part out of the exercise of the privilege of an alcoholic beverage license, or any amount due under the Unemployment Insurance Code

when such liability arises out of the conduct of a business licensed by the Department of Alcholic Beverage Control."

California Unemployment Insurance Code, Section 1701

"The wage earner and employer contributions required to be paid by any employing unit under this division, together with interest and penalties, shall be satisfied first in any of the following cases:

(a) Whenever the employing unit is insolvent.

(b) Whenever the employing unit makes a voluntary assignment of its assets. . . ."

California Unemployment Insurance Code, Section 1702

"Section 1701 does not give the State a preference over any recorded lien which attached prior to the date when the amounts required to be paid became a lien and the preference given to the State by that section is subordinate to the preferences given to claims for personal services by Sections 1204 and 1206 of the Code of Civil Procedure."

California Revenue and Taxation Code, Section 6756

"The amounts required to be paid by any person under this part together with interest and penalties shall be satisfied first in any of the following cases:

(a) Whenever the person is involvent.

(b) Whenever the person makes a voluntary assignment of his assets.

(c) Whenever the estate of the person in the hands of executors, administrators, or heirs is insufficient to pay all the debts due from the deceased.

(d) Whenever the estate and effects of an absconding, concealed, or absent person required to pay any amount under this part are levied upon by process of law.

This section does not give the State a preference over any recorded lien which attached prior to the date when the amounts required to be paid became a lien.

The preference given to the State by this section shall be subordinate to the preferences given to claims for personal services by Sections 1204 and 1206 of the Code of Civil Procedure."

Issues Presented.

1. May the Bankruptcy Court entertain a petition for review of an order of the Referee which is filed more than ten days after the entry of that order where no extension for said late filing has been granted by the Referee?

2. Were payments made by the Assignee to the California Department of Employment and Board of Equalization in connection with his transfer of a liquor license proper in view of the existence of wage liens which by statute are superior to the obligations owing by the Assignor to the Department of Employment and Board of Equalization?

3. Was the Assignee entitled to pay himself a fee and reimburse himself for expenses incurred during his administration where the employees of the Assignor have prior unsatisfied wage lien claims which exceed in amount the totality of the assignment assets?

ARGUMENT.

I.

Appellant's Petition for Review of the Referee's Order of October 23, 1958, Being Untimely, Should Not Have Been Entertained.

Section 39c of the Bankruptcy Act dealing with the review of a referee's order provides as follows:

> "A person aggrieved by an order of a referee may, within ten days after the entry thereof, or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge . . ."

While there are decisions to the effect that the ten day review limitation applies only to the person aggrieved by the referee's order and does not bar the bankruptcy court from hearing the review even after the expiration of the ten day period for good cause shown, the most recent expression of this Court has been that filing within the ten day period is imperative. *Bookey v. King,* 236 F. 2d 871. This decision has been cited with approval by the Seventh Circuit in the recent case of *In re Tyne,* 261 F. 2d 249.

It is submitted that even if the District Court has the discretion to entertain a petition for review filed more than ten days after the entry of the order sought to be reviewed, such discretion should not be exercised save upon the demonstration by the petitioner on review of substantial justification for his laches. *In re Sadler,* 104 Fed. Supp. 886. The reasons set forth by Appellant in his petition for an extension filed with the Referee [Tr. of R. pp. 45-46] do not in any manner whatsoever fur-

nish justification for the entertainment of his untimely petition for review.

> "It is the duty of counsel to examine the record in a case himself. . . . Neglect of this duty is no excuse for delay in filing a petition." *In re Robinson,* 42 Fed. Supp. 342.

II.

The Liquor License of Vensep, Inc. Was Property Which Became an Asset of the Assignee's Estate Subject to the Lien for Wages.

The Appellant Meyer contends that the liquor license of the Bankrupt was not property and never became an asset of the insolvent estate of the Assignee. (Opening Brief of Appellant, pp. 26, 27.) This contention is contrary to the California law where it is now well settled that a liquor license is property.

In re Quaker Room, 90 Fed. Supp. 758;

Golden v. State of California, 133 Cal. App. 2d 640;

Etchart v. Pyles, 106 Cal. App. 2d 549.

Although a liquor license is merely a privilege so far as the relations between the licensee and the state are concerned, it is property in any relationship between the license and third persons because the license, being transferable under Section 24070 of the Business and Professions Code, has value and may be sold.

Mollis v. Jiffy-Stitcher Co., 125 Cal. App. 2d 236;

Doggender v. Seattle Brewing and Malting Co., 41 Wash. 385, 83 Pac. 898; 4 L. R. A. N. S., 626, 628;

Jaffe v. Pac. Brewing and Malting Co., 69 Wash. 308, 124 Pac. 1122.

A liquor license that is transferable has been held to be property subject to execution and attachment if local law provides a statutory procedure therefor.

Rowe v. Colpoys, 137 F. 2d 249, 148 A. L. R. 488, 492;

Stallinger v. Goss (Mont.), 193 P. 2d 810.

In this connection, the California Attorney General in a well considered recent opinion at 33 Ops. Cal. Atty. Gen. 140 (June 9, 1959), ruled that liquor licenses are property subject to attachment and execution. In reaching this conclusion, the Attorney General examined numerous authorities cited therein, and stated in part as follows:

> "It is common knowledge, however, that liquor licenses are bought and sold in the open market. (*Mollis v. Jiffy-Stitcher Co.,* 125 Cal. App. 2d 236, 238.) For this reason the courts have, where the licensee and a party other than the licensing agency were involved, considered such licenses to be property. *Roehm v. County of Orange,* 32 Cal. 2d 280; *Golden v. State of California,* 133 Cal. App. 2d 640; and *In re Quaker Room,* 90 Fed. Supp. 758. In the *Roehm* case the California Supreme Court held that liquor licenses are not subject to *ad valorem* taxation as personal property because they are not included in the list of taxable intangibles specified in article XIII, section 14 of the California Constitution and section 111 of the Revenue and Taxation Code. Implicit in the opinion is the premise that liquor licenses are intangible property. In the *Golden* case, the court held that a license was property as that term is used in 26 U. S. C. sec. 3670, which gives the federal government a lien for taxes 'upon

> all property and rights to property, whether real or personal, belonging to such person.' And in the case of *In re Quaker Room,* the court held that a California liquor license was property as that term is used in the Bankruptcy Act. The court therein referred to the decisions refusing to classify a license as property for purposes of the due process clause as being a 'characterization for . . . a limited purpose.' The courts in the last two cases emphasized the fact that liquor licenses are transferable under the Alcoholic Beverage Control Act (secs. 24070 to 24076 Bus. & Prof. Code)."

A liquor license is also regarded as property that passes to the trustee in bankruptcy.

In re Fuetl, 247 Fed. 829;

Fisher v. Cushman, 103 Fed. 860, 51 L. R. A. 292;

In re Quaker Room, 90 Fed. Supp. 758.

The foregoing decisions recognize the principal that where a liquor license has a transferable value to the debtor as it does in California, it is property that in fairness ought to be within the reach of his creditors.

Roehm v. County of Orange, 32 Cal. 2d 280, 283.

There is no merit to the contention of the Appellant Meyer that the labor claims can only be asserted against the proceeds of the sale of the liquor license "after deducting the state taxes" (Opening Brief of Appellant, p. 25), which tax payments were made by the assignee in derogation of the wage liens as hereinafter discussed, *infra.* Just as the court in the *Golden* case, *supra,* pp. 645-646, held the proceeds from the liquor license to be property subject to a lien for federal taxes, the proceeds

in the sum of $5,800.00 derived from the sale of the liquor license herein were subject to the wage liens arising under Section 1204 of the California Code of Civil Procedure.

It is interesting to note that Meyer considered the *full* selling price of the liquor license, namely, the sum of $5,800.00 a part of the "*net* realization from liquidation of the assets" in computing his fee of $423.70 being 6 per cent of such *net* proceeds (Opening Brief of Appellant, p. 5), which consisted of the sum of $1,260.05 in addition to the proceeds from the liquor license. [Tr. of R. pp. 8, 9.] Yet Appellant Meyer would have the wage liens charged with the payment of the state tax claims, but not the assignee. This appellees submit, the court will not permit Meyer to do.

III.

Payment by the Assignee of State Taxes From Funds Impressed by Prior Wage Liens Is Contrary to Law.

The wage liens under Section 1204 of the California Code of Civil Procedure are expressly made paramount to the state tax claims paid by the assignee by Section 6756 of the California Revenue and Taxation Code and Section 1702 of the California Unemployment Insurance Code. In view of this explicit mandate, payment of the junior tax claims by Meyer was in derogation of the wage liens.

The fact that the California Department of Alcoholic Beverage Control under Section 24049 of the Business and Professions Code required payment of the state taxes as a condition precedent to the transfer of the liquor license did not warrant Meyer making such payments in derogation of the prior wage liens. Such an application of

the statute would constitute an unconstitutional impairment of a property right. In the case of *Golden v. State of California*, 133 Cal. App. 2d 640, 644, the court pointed out that the right to transfer a liquor license "enjoys constitutional immunity from legislative impairment." Thus, a law prohibiting a liquor license from being pledged as a security could not be given a retroactive effect so as to impair a transfer of the license under a pledge agreement entered into prior to the enactment of the statute. *Pehau v. Stewart,* 112 Cal. App. 2d 90, 96.

IV.

California Business and Professions Code, Section 24049 Is Not Controlling.

The Appellant Meyer relies upon California Business and Professions Code, Section 24049 for the validity of tax payments made by him to the Department of Employment and Board of Equalization in derogation of the priority accorded wage liens over such taxes by Section 1702 of the California Unemployment Insurance Code, and Section 6756 of the California Revenue and Taxation Code. It is the contention of the Appellant that the aforesaid Section 24049 repeals by implication the latter sections.

To overcome the presumption against repeals by implication the two acts must be irreconcilable, clearly repugnant and so inconsistent that they cannot have concurrent operation.

California Drive-In Restaurant Assn. v. Clark, 22 Cal. 2d 287, 292;

Penziner v. West American Finance Co., 10 Cal. 2d 160, 176;

Estate of Harrison, 110 Cal. App. 2d 717, 721.

Furthermore, in order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first.

Penziner v. West American Finance Co., supra, p. 176.

Applying the foregoing legal principles to the statutes involved herein, it is readily apparent that Business and Professions Code, Section 24049, does not in any manner revise, or even attempt to revise, the subject matter of Section 1702 and Section 6756, both of which sections are concerned only with priority status of taxes and wages where the debtor is insolvent or makes a voluntary assignment of assets as is involved in the instant case.

Section 24049 of the Business and Professions Code merely provides that the Department of Alcoholic Beverage Control may refuse the transfer of a liquor license when the applicant is delinquent in the payment of certain taxes. It is obviously not in *pari materia* with the statutes contained in the Unemployment Insurance Code and the Revenue and Taxation Code, the object of which statutes is to establish priorities in cases of insolvency.

It is necessary before the court may imply a repeal that the objects of the two statutes be the same. If they are not, both will stand though they may refer to the same subject.

People v. Platt, 67 Cal. 21.

V.

The Priority Statutes Are Special and Control the General Provision of Section 24049 of the Business and Professions Code.

The contention of Meyer that Section 24049 of the Business and Professions Code controls is based upon an erroneous premise that the said section is a special statute and that Section 1702 and Section 6756 are general. On the contrary, it would appear that the latter sections more readily fall within the class of special legislation treating as they do specifically of priorities in insolvency cases, while the former statute is concerned with tax payments in general.

Thus, in *Division of Labor Law Enforcement v. Moroney,* 28 Cal. 2d 344, the California Supreme Court held a statute to be general which required the payment of a court reporter's fee and specifically extended the requirement to the state and public officers, and therefore it was held not to control a *prior* enacted statute exempting a public officer, namely, the Division of Labor Law Enforcement from the payment of any court costs, such statute being held to be special.

Assuming *arguendo* that there is a conflict in the statutes, the special controls the general. Furthermore, it should be noted that Section 24049 of the Business and Professions Code is permissive whereas the priority statutes are mandatory. Under such circumstances it cannot be held to be the controlling statute.

VI.

As of May 29, 1957, the Claims of the Department of Employment and Board of Equalization Together With the Assignee's Right to Fees and Reimbursement of Expenses Were Inferior to the Claims of the United States and the Employees of Vensep, Inc.

On May 29, 1957, the date of its execution of a general assignment for the benefit of its creditors to Meyer, Vensep, Inc. was indebted to its former employees for wages earned within ninety days of the said assignment in the sum of $7,662.85 and to the United States for taxes in the sum of approximately $7,000.00. [Referee's Findings of Fact VI, Tr. of R. p. 42.]

Immediately upon the execution of the general assignment to Meyer, a lien arose upon the assigned assets in his possession in the sum of $7,662.85 in favor of Vensep's former employees. California Code of Civil Procedure, Section 1204; *Division of Labor Law Enforcement v. Stanley Restaurants* (C. A. 9th) 228 F. 2d 420. This lien was prior in right to the obligations then owing by Vensep, Inc. to the Department of Employment and Board of Equalization. California Unemployment Insurance Code, Section 1702; California Revenue and Taxation Code, Section 6756.

Further, the Section 1204 lien was superior to the right of the Assignee to pay himself a fee and to reimburse himself for expenses incurred. *Division of Labor Law Enforcement v. Stanley Restaurants, supra.*

As of May 29, 1957, the United States was invested with a priority as against all of the assets of Vensep, Inc. in the hands of the Assignee, Meyer, by virtue of the approximately $7,000.00 in taxes owing to it. Re-

vised Statutes, Section 3466 (U. S. C. A., Title 31, Sec. 191). Although the priority of the United States did not have lien status (Kennedy *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien,* 63 Yale Law Journal, p. 903 *et seq.*), it was superior in stature to the Section 1204 lien rights of the former employees of Vensep, Inc. *United States v. Division of Labor Law Enforcement,* 201 F. 2d 857.

Not only was the priority position accorded to the United States by Section 3466 superior to the Assignee's right to pay his fees and expenses, but when Meyer made such payments in derogation of this priority, he rendered himself personally liable to the United States. Revised Statutes, Section 3467 (U. S. C. A., Title 31, Sec. 192).

Thus, upon the execution of the assignment to Meyer on May 29, 1957, the obligations owing by Vensep, Inc. to the Department of Employment and Board of Equalization as well as Meyer's right to fees and reimbursement of expenses were clearly inferior to the lien rights of Vensep's employees which, in turn, at said date, were subordinate to the paramount priority of the United States.

VII.

With the Advent of Bankruptcy the Trustee Succeeded to the Lien Rights of the Vensep Employees Who, in Turn, by Virtue of the Bankruptcy, Secured a Higher Priority Position Than That of the United States.

With the filing of an involuntary petition in bankruptcy against Vensep, Inc. on July 17, 1957, [Referee's Findings of Fact II, Tr. of R. p. 40], the paramount priority of the United States against the funds in the

hands of the Assignee arising by virtue of Section 3466 terminated. 3 Collier on Bankruptcy, Section 64.502.

The advent of bankruptcy served to avoid the non-possessory lien given employees of Vensep, Inc. by Section 1204 of the Code of Civil Procedure. Section 67c(2), Bankruptcy Act. However, while the Section 1204 lien was invalidated by bankruptcy, it was capable of preservation by the Trustee for the benefit of the estate (Section 67c(2), Bankruptcy Act) and it was in fact so preserved. [Order of Referee re Objections to Assignee's Report and Account dated October 23, 1958, Tr. of R. p. 44].

By virtue of his preservation of the Section 1204 lien, the Trustee, as of the date of bankruptcy, had a specific charge against the funds in the hands of the Assignee which was superior to the claims of the Department of Employment and Board of Equalization as well as to the Assignee's right to fees and reimbursement of expenses. California Unemployment Insurance Code, Section 1702; California Revenue and Taxation Code, Section 6756; *Division of Labor Law Enforcement v. Stanley Restaurants, supra.*

Further, the inception of bankruptcy reversed the priority status which existed between the United States and employees of Vensep, Inc. during the course of the assignment and placed the wage indebtedness owing to said employees in a second priority position as contrasted with the fourth priority position enjoyed by the tax indebtedness to the United States. Sections 64a(2) and (4), Bankruptcy Act.

The employees of Vensep, Inc. acting through the Division of Labor Law Enforcement, filed their claims in these proceedings in the total sum of $7,662.85 as prior wage claims under Section 64a(2) of the Bank-

ruptcy Act. [Petition re Objections to Report and Account of Assignee for Benefit of Creditors and for Order to Show Cause Thereon, Tr. of R. p. 23]. Appellant contends that the filing of an unsecured, though prior, claim in these proceedings by the Division of Labor Law Enforcement resulted in a waiver of the Section 1204 lien. (Opening Brief of Appellant, pp. 20-22).

This argument is untenable for the reason that it presupposes that with the advent of bankruptcy an employee has a valid lien for wages owing which he may choose to assert against the assets of the bankrupt estate. Bankruptcy serves to avoid the Section 1204 lien for wages subject only to the right accorded exclusively to the trustee to effect the lien's preservation for the benefit of the estate. Section 67c(2), Bankruptcy Act. Accordingly, when the Division of Labor Law Enforcement filed its proof of claim in these proceedings it had no lien status to assert and could only set forth a priority claim.

VIII.

The Employees of Vensep, Inc. Were Substantially Prejudiced by the Assignee's Disbursements.

Appellant argues that the employees of Vensep, Inc. suffered no prejudice by his disbursements due to the fact that the tax claim of the United States would have consumed the entirety of the assignment estate and left nothing for the employees. (Opening Brief of Appellant, pp. 17-18). Appellant's contention must be viewed with the knowledge that the assignment made to him was superseded by a bankruptcy proceeding filed within four months of the execution of the assignment. The assignment executed to Meyer on May 29, 1957, vested him with a

defeasible title to the assets of Vensep, Inc. which could become absolute only upon the non-intervention of a bankruptcy within four months from said date. *State of Oregon v. Ingram,* (C. A. 9th) 63 F. 2d 417.

> "When the assignee takes charge of an assigned estate, he must be charged with knowledge that he is acting under an instrument which in and of itself constitutes an act of bankruptcy, and that, if bankruptcy proceedings are commenced within four months of the date of the assignment which result in adjudging his assignor a bankrupt, he, as the assignee, merely holds the assigned estate for the use and benefit of the creditors of the bankrupt, and that the bankruptcy court is the court which has the sole right and power to administer the estate." *State of Oregon v. Ingram, supra,* at p. 422.

Accordingly, when Meyer accepted the assignment he became, for a four month period, subject, at his peril, to the distributive scheme of the Bankruptcy Act. *State of Oregon v. Ingram, supra.* With the superseding bankruptcy filed within four months of the making of the assignment, Meyer's actions from May 29, 1957, to July 17, 1957, and thereafter came within the scrutiny of the bankruptcy court, said court having the right to reexamine and determine the propriety and reasonableness of all disbursements made by him during said period and to surcharge him the amount of any disbursement determined by the court to have been improper or excessive. Section 2a(21), Bankruptcy Act.

By virtue of the superseding bankruptcy filed on July 17, 1957, and the resulting termination of the Section 3466 priority of the United States (3 Collier on Bankruptcy, Section 64.502), the obligations owing to the em-

ployees of Vensep, Inc. assumed a priority status higher than that of the United States. Sections 64a(2) and (4), Bankruptcy Act. The priority of the employees being greater than that of the United States, said employees, therefore, suffered very definite prejudice by virtue of Meyer's disbursements.

IX.

The Trustee in Bankruptcy Would Have Secured a Maximum Return for the On-Sale Liquor License of Vensep, Inc.

Appellant analogizes the liquor license of Vensep, Inc. to a membership in the stock exchange and argues that just as a bankruptcy trustee takes only the proceeds from a sale of the stock exchange membership remaining after deduction of dues owing to the exchange and debts owing to the exchange's members so also he takes only those proceeds from the sale of a liquor license which remain after payment of those sums which must be paid before a transfer of the license will be allowed. (Opening Brief of Appellant, pp. 24-25). In effect, Appellant is arguing that all that passes to a bankruptcy trustee from the sale of either a membership in the stock exchange or a liquor license is the equity remaining in either asset after the payment of the pre-existing conditions built into said assets by the agencies responsible for their creation.

The agency responsible for the creation of the liquor license is the State of California. California Constitution, Article XX, Section 22. The task of regulating the transfer of liquor licenses has been delegated by the State to the Department of Alcoholic Beverage Control (California Business and Professions Code, Section 23049 *et seq.*) subject to those terms and conditions which the

State chooses to impose. *People v. Jemenez,* 49 Cal. App. 2d Supp. 739. The State, speaking through California Business and Professions Code Section 24049, has given to the Department of Alcoholic Beverage Control the right to refuse the transfer of a liquor license when the applicant is delinquent in the payment of certain taxes or contributions. However the State has further spoken through Sections 1702 of the California Unemployment Insurance Code and 6756 of the California Revenue and Taxation Code and has thereby, in effect, told the Department of Alcoholic Beverage Control that where a Section 1204 lien exists in favor of an employee of the licensee, that lien is to take precedence over the licensee's obligation to the Department of Employment and Board of Equalization.

Assuming that Appellant's argument is sound and considering the worth of Vensep's liquor license to be the sum of $5,800.00 [Referee's Findings of Fact III, Tr. of R. p. 41] and its lien obligations to its employees to be the sum of $7,662.85 [Referee's Findings of Fact VI, Tr. of R. p. 42], it is apparent that the "pre-existing conditions" built into the liquor license of Vensep, Inc. by the State require payment of the totality of the license's selling price to the employee class. Since the lien in favor of employees for wages owing arises not only upon the execution of a general assignment but also upon the bankruptcy of the employer (California Code of Civil Procedure, Section 1204), the Trustee in Bankruptcy of Vensep, Inc. by virtue of the provisions of Section 67c(2) of the Bankruptcy Act would have succeeded to the lien rights of the Vensep employees whether or not an assignment had been made to Meyer and would have, by virtue of that succession, become entitled to all of the sales price of $5,800.00.

X.

The Assignee Was Remiss in the Administration of His Trust and Is Therefore Subject to a Surcharge.

With the execution of the general assignment to him on May 29, 1957, Meyer, as assignee, became a trustee for the benefit of the creditors of Vensep, Inc. *Brainard v. Fitzgerald,* 3 Cal. 2d 157. Meyer should have determined the fact that as of the above date Vensep, Inc. was indebted to its employees for wages earned within ninety days of the assignment in the sum of $7,662.85. In that connection it should be noted that Section 1204 of the Code of Civil Procedure imposes no requirement on the part of any employee to give notice to the assignee of the existence of his claim. Section 1204 provides only that the assignee shall have the right to require sworn claims to be presented, and, accordingly, places upon said assignee the duty of insisting, if he so desires, on the presentation of an attested claim.

The employees of Vensep, Inc. being the principal beneficiaries of Meyer's trust (Code of Civil Procedure, Section 1204; California Unemployment Insurance Code, Section 1702) California Revenue and Taxation Code, Section 6756) save perhaps for the United States (Revised Statutes, Section 3466; U. S. C. A., Title 31, Section 191) were entitled to the full proceeds which Meyer received for the on-sale liquor license. By virtue of his payments to the Department of Employment and Board of Equalization from the liquor license proceeds, Meyer breached his trust to the employee-beneficiaries.

Assuming, *arguendo,* that the Department of Alcoholic Beverage Control was cognizant of the wage liens of Vensep's employees when it required payment of the

subordinate claims of the Department of Employment and Board of Equalization, Meyer was under a legal duty to resist this determination and could have done so by resort to appropriate judicial process such as the writ of mandamus. California Government Code, Sec. 11523; *Covert v. State Board of Equalization,* 29 Cal. 2d 125; *Irvine v. State Board of Equalization,* 40 Cal. App. 2d 280.

"The rule is that when a trustee is in doubt, as to any matter arising in the execution of the trust, he may wait till a bill is brought (filed) against him, or he may bring a bill, seeking direction of the court." Burrill, *Treatise on the Law and Practice of Voluntary Assignments for the Benefit of Creditors* at p. 504.

In fact, the Bankruptcy Act contemplates resort by an assignee to the courts by providing that an assignee shall not be surcharged for disbursements which are approved by a court of competent jurisdiction upon notice to creditors and other parties in interest. Section 2a(21), Bankruptcy Act.

The record is devoid of any evidence indicating that Meyer brought the fact of the existence of the wage liens to the attention of the Department of Alcoholic Beverage Control. In fact, the record supports the inference that Meyer did not. [Letter to Referee dated October 14, 1958, and particularly paragraph 3 thereof, Tr. of R. p. 34.] Since the presumption is that the official duty was regularly performed (Code of Civil Procedure, Section 1963 (15)) and since the Department of Alcoholic

Beverage Control insisted upon the payment of Vensep's obligations to the Department of Employment and State Board of Equalization, it must be assumed that the Department of Alcoholic Beverage Control was not cognizant of the existence of the wage liens.

By his failure to apprise the Department of Alcoholic Beverage Control of the existence of the wage liens, Meyer was negligent and by virtue of such negligence he became subject to surcharge. Burrill, *Treatise on the Law and Practice of Voluntary Assignments for the Benefit of Creditors,* page 504.

Appellant argues that by virtue of the terms of the assignment made to him by Vensep, Inc. he did not succeed to its on-sale liquor license but merely became Vensep's agent for the purpose of effecting a sale of the license. Appellant further argues that he, as assignee, succeeded only to the proceeds realized from his sale, as agent, of the liquor license in question. (Opening Brief of Appellant, pp. 26-27). Whether his capacity was that of agent for Vensep, Inc. or trustee for its creditors, Meyer was under a legal duty to secure the maximum possible return for the license upon its transfer and sale. This he failed to do.

XI.

Since an Assignee Voluntarily Assumes to Act There Is No Inequity in Denying Him Compensation and Reimbursement of Expenses Where the Estate Is Insufficient to Support Said Payments.

Under proper circumstances the general assignment for the benefit of creditors is a very salutary method of liquidating a debtor's estate. For his services to the creditors in the usual assignment an assignee is certainly entitled to reasonable compensation. However, the assignee's ". . . assumption of duty is voluntary. Before he evidences his consent he must determine from a reasonable aspect of the situation as it then appears whether a remuneration will accrue to him or not. He is the sole judge, under the circumstances, and must abide by the results, whether favorable to him or otherwise." *Division of Labor Law Enforcement v. Stanley Restaurants,* 228 F. 2d 420, 425.

Had Meyer chosen to heed the foregoing words, he could have determined at the time that Vensep, Inc. tendered the proposed assignment to him that the realizable assets would not exceed even those sums owed by Vensep, Inc. to its employees. It was inevitable from the foregoing that the employees of Vensep, Inc. in view of the paramount priority of the United States which existed under the assignment (Revised Statutes, Sec. 3466; U. S. C. A. Title 31, Sec. 191), had to resort, and did, to the Bankruptcy Act to protect their status and secure a reversal of the order of priority. Sections 64a(2) and (4), Bankruptcy Act. Accordingly, Meyer has no stand-

ing to complain of the surcharge imposed upon him for his actions in derogation of the rights of the employees of Vensep, Inc.

Conclusion.

Wherefore, Appellees and Cross-Appellants pray:

1. That that portion of the Order of the District Judge, dated March 27, 1959, denying the Trustee's motion to dismiss the petition for review of Appellant be reversed.

2. That the Order of the Referee, dated October 23, 1958, be affirmed.

3. That Appellees and Cross-Appellants recover of Appellant their costs on appeal.

Respectfully submitted,

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By HERMAN L. GLATT,
Attorneys for Irving I. Bass.

PAULINE NIGHTINGALE,
CONRAD LEE KLEIN, and
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No. 16459

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RALPH MEYER,

Appellant,

vs.

IRVING I. BASS, Trustee in Bankruptcy of the Estate of VENSEP, INC., etc., Bankrupt, and DIVISION OF LABOR LAW ENFORCEMENT.

Appellees,

IRVING E. BASS, Trustee in Bankruptcy of the Estate of VENSEP, INC., Bankrupt,

Appellant,

vs.

RALPH MEYER,

Appellee.

REPLY BRIEF OF APPELLANT RALPH MEYER.

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No. 16459

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Appellant,

vs.

RALPH MEYER,

Appellee.

REPLY BRIEF OF APPELLANT RALPH MEYER.

I.

Appellant's Petition for Review of the Referee's Order of October 23, 1958 Was Properly Entertained.

In the Order on Review of Referee's Order of October 23, 1958 [Tr. of R., p. 61] the court stated:

> "although petitioner failed to file a petition for review within the time prescribed by Section 39 c of the Act (see 11 U. S. C., 67 c), this Court exercising equitable powers may, and under the circumstances here should, entertain the present petition for review (*In re Steinberg,* 138 Fed. Supp. 462, S. D., Cal., 1956)."

> "We do not think that Section 39, Subd. c. was intended to be a limitation on the sound discretion of the bankruptcy court to permit the filing of petitions for review after the expiration of the period. . . . The review out of time of the Commissioner's Orders is then a matter for discretion of the District Court."
>
> *Pfister v. Northern Illinois Finance Co.,* 317 U. S. 144, 63 S. Ct. 133.

A petition for review from an order of a referee in bankruptcy, even though the time for the filing thereof has expired, *should* be heard by the court.

> *In re Steinberg,* 138 Fed. Supp. 462 (S. D., Calif.).

It is a matter resting within the sound discretion of the District Court whether a petition for review of a referee's order should be entertained where the petition is filed late.

> *In re F. P. Newport Corporation,* 137 Fed. Supp. 58 (S. D., Calif.);
>
> *In re C. & P. Co.,* 63 Fed. Supp. 400 (S. D., Calif.).

Appellees cite (Appellees' Reply Brief, p. 6) *Bookey v. King,* 236 F. 2d 871 for the proposition that the filing of the petition for review within the ten day period is "imperative." In this case the petition for review was filed eight months late and the court then proceeded to discuss the facts of the particular case and decided that there was no adequate excuse for the late filing of the petition.

Appellees refer (Appellees' Reply Brief p. 6) to *In re Sadler,* 104 Fed. Supp. 886 as authority for stating that,

"substantial justification" must be shown to permit the filing of a petition for review out of time. There is no indication from an examination of this case that the Court applied any principles different from those relied on in the authorities cited above, but rather exercised its discretion in deciding whether to allow the late filing of the petition for review. The imposition of a requirement of "substantial justification" for the filing of a late petition would not be warranted on the basis of this case; and, if such a requirement were proper it would add nothing to the settled law on this subject which places the decision within the discretion of the District Court as to allowing the filing of a late petition for review.

In the case of *In re Robinson,* 42 Fed. Supp. 342 (Appellees' Reply Brief p. 7), the Court discussed the merits of the petition and its finding against the petitioner *on the merits* was the basis of its decision.

The District Court properly exercised its equitable powers in allowing the petition for review to be filed herein.

II.

A Liquor License Has No Value Unless It Can Be Transferred and Sold. The Value of a Liquor License, From the Time of Its Issuance, Cannot Have a Value in Excess of the Sales Price Minus the State Taxes Set Forth in Business & Professions Code, Section 24049 Unpaid at the Date of Sale.

Appellees argue (Appellees' Reply Brief pp. 7-10) that the subject liquor license was property which became an asset of the Assignee's Estate subject to the lien for wages. However, Appellees admit (Appellees' Reply Brief p. 7) that, "a liquor license is merely a privilege so far

as the relations between the licensee and the state are concerned"; but Appellees state (Appellees' Reply Brief p. 7) that it is property, which has value *and may be sold,* as between a licensee and a third person.

A liquor license is a document which permits the licensee to do that which would otherwise be unlawful.

> *Irvine v. State Board of Equalization,* 40 Cal. App. 2d 280.

The piece of paper has no value in and of itself. The liquor license has value to some entity which wants it and is willing to pay money for the intangible right which it represents, *i.e.,* permission by the State to sell alcoholic beverages. Of course, the prospective purchaser, in order to use the license, must have the license transferred to him and placed in his name. Therefore, any value which might be placed on the license is dependent and conditioned upon the transfer of the right which the license represents to the purchaser.

The Assignee, Appellant herein, therefore, merely had custody of a piece of paper without value until the license could be transferred and sold to a third person. But, a sale of the liquor license could not be consummated without the consent of the Department of Alcoholic Beverage Control. The Department, under Business & Professions Code, Section 24049, demanded the payment of the said state taxes as a condition precedent to the transfer of the license. These taxes were deducted from the moneys paid by the purchaser and the balance preserved. There was no realizable asset for the benefit of creditors and the labor claimants *until the license was sold* and the license could not be sold without first paying the demand of the Department for state taxes.

The sole "asset," other than merchandise and supplies of the business which were sold for $960.05 [Tr. of R. p. 9], herein was a document called a liquor license which permitted the *named licensee* to sell alcoholic beverages in the State of California. The piece of paper had no intrinsic value apart from the right to sell alcoholic beverages, which it represented. In order to realize a value for creditors of the Estate, the license had to be sold. Inasmuch as the "license" would carry no rights until the transferee became the *named licensee,* the license could have no value without the consent to transfer by the Department. Here, the Department demanded the payment of state taxes as a condition precedent to the transfer of the license under Business & Professions Code. Section 24049. Without paying the state taxes, there could be no transfer of the license and no sale and no money for anyone; consequently, the question of *priority* of creditors claims to the assets of the insolvent estate is subordinate to the determination of what funds or property are actually *assets* of the Estate. Inasmuch as the Department, pursuant to Business & Professions Code, Section 24049, demanded payment of state taxes as a condition precedent to transfer of the license, *only* that fund consisting of the *sales price minus the amount of state taxes* could be an "asset" of the estate for creditors.

The rationale of the Department's position is obvious. If the state permits an individual to sell alcoholic beverages, payment of state taxes arising from the operation of the liquor business is a condition of the permission and, in fact, constitutes a deductible item *at all times,* due and payable from the inception of the licensed business, from the sale price of the license. Thus, the value

of the liquor license at any time after its issuance can only be the price to be paid therefor minus the amount of state taxes which have accrued to that date. The "proceeds of the sale" of the liquor license could never exceed the sale price *minus* the state taxes.

The Assignee, acting as agent for the Assignor only takes those rights, duties or obligations which his assignor had at the time with the Department of Alcoholic Beverage Control. Inasmuch as the assignor could not have voluntarily transferred the license to a third person prior to the Assignment without paying the demands of the Department of Alcoholic Beverage Control, the Assignee acquired, and could only acquire, the piece of paper titled "liquor license" impressed with the obligation to pay the demands of the State of California, Here, the sale price of the license was $5800 and the state taxes totalled $3401.38; therefore, the maximum amount which the Assignee could have held for the benefit of creditors arising from the license, at any time, was the sum of $2398.62. [Tr. of R. p. 41].

The foregoing principles relating to the transfer and sale of the liquor license and its prospective value to the Estate would apply with like force and effect to a Trustee in Bankruptcy.

III.

There Is No Legal Basis for the Assignee to Resist the Demands of the Department to Pay the State Taxes as a Condition Precedent to the Transfer of the License Because Such Demand Was Proper, Lawful and Reasonable Under Business and Professions Code, Section 24049. The Assignee Should Not Be Surcharged Where He Obtained the Maximum Possible Fund for Creditors From the Sale of the License.

Appellees contend (Appellees' Brief pp. 21, 22 and 23) that the Assignee was remiss in the administration of the insolvent Estate; and, further (Appellees' Brief p. 21), that the labor claimants were the "principal beneficiaries" of the Estate and, "were entitled to the full proceeds which *Meyer received* for the on-sale liquor license." However, the Assignee only *received* the difference between the sale price of the license minus the state taxes required to be paid by the Department of Alcoholic Beverage Control. Appellees would impose a "trust" on the Assignee in favor of the wage claimants on property which was never a part of the Estate and over which the Assignee had no control. This cannot be done.

Appellees state (Appellees' Brief p. 22) that the Assignee "was under a legal duty to resist" the demand of the Department of Alcoholic Beverage Control and could have done so by litigating the matter by using the writ of mandamus. Appellees cite the cases of *Covert v. State Board of Equalization,* 29 Cal. 2d 125 and *Irvine v. State Board of Equalization,* 40 Cal. App. 2d 280, as authority for this proposition. Both of these cases involved the use

of the writ of mandate with reference to appealing the cancellation or revocation of liquor licenses. Neither of these cases are authority for the proposition that the Assignee could use a Writ of Mandate to compel the Department to transfer the license without the payment of the state taxes demanded as a condition precedent to such transfer. Appellees also cite California Government Code, Section 11523, as authority for the Assigneee using a writ of mandate in this situation. Government Code, Section 11523, is contained in Chapter 5, of Division 3, of Title 2, of the California Government Code which is titled "Administrative Adjudication." The entire chapter, including Section 11523, deals *solely* with the manner, procedure and review of a *hearing* by an administrative agency to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned (Gov. Code, Secs. 11500-11528). The writ of mandate set forth in Government Code, Section 11523 is *solely* for the purpose of obtaining judicial review of a decision by an agency concerning the licensing of an entity and does not, in any manner, apply to the case at bar.

In fact, there is no legal authority whatsoever for Appellees' contention that the Assigneee could have resisted the imposition by the Department of the payment of the state taxes, admittedly due, owing and unpaid, as a condition precedent to the transfer of the liquor license. The Department has been granted the authority to compel the payment of these taxes as a condition precedent to the transfer of the license by the legislature in Business &

Professions Code, Section 24049 and the Assignee had no choice under the circumstances other than to submit to the Department's lawful and proper demands for payment. There was, and is, no legal basis for objecting or resisting the Department's demand inasmuch as the law (Bus. & Prof. Code, Sec. 24049) specifically conferred upon the Department the power and right to so do.

Appellees argue (Appellees' Brief p. 23) that, "it must be assumed that the Department was not cognizant of the existence of the wage liens." Appellees (Appellees' Brief pp. 22-23) come to this conclusion from the fact that the Department insisted upon payment of the state taxes as a condition precedent to transfer of the license. Appellees also state (Appellees' Brief p. 22) that the record fails to show that the Assignee informed the Department of wage claims and (Appellees' Brief p. 23) that this constituted negligent conduct by the Assignee subjecting him to surcharge. It should be noted that the Findings of Fact [Tr. of R. pp. 39-44] states [Tr. of R. p. 41] that the Department of Employment and Board of Equalization were aware of Appellant's capacity as Assignee of Vensep, Inc., at the time the Department demanded payment of said taxes prior to the transfer of the license. If assumptions are to be drawn which cannot be based on facts disclosed by the record, it would be at least as plausible to assume that the Department was aware and had been notified of the wage claims by the Assignee as Appellees' assumption that the Department had not been appraised of the wage claims by the Assignee. Further, to establish

a breach of duty by the Assignee to support Appellees' position that the Assignee was negligent, the Assignee must have been under a *duty* to inform the Department of the existence of the wage claims. Inasmuch as the Department has never waived its right to demand the payment of state taxes as a condition precedent to the transfer of the license where wage claims were present, the law would not impose a duty on the Assignee to a useless act.

Appellees contend (Appellees' Brief p. 23) that Appellant failed "to secure the maximum possible return" on the sale of the license. Neither Appellant nor the Trustee in Bankruptcy could have realized a sum in excess of the sales price of the license minus the state taxes for the benefit of the creditors of the insolvent estate.

Appellees' have failed to present any authority which would support the proposition that the labor claimants could have received a larger dividend from the insolvent estate than they did receive herein if the Trustee in bankruptcy had sold the license rather than the Appellant.*

Appellees urge, without citing any legal authority therefor, that the Appellant should have obtained a transfer of the liquor license without paying the demand for taxes made by the Department as a condition precedent thereto; although there is no showing of any kind that anyone has yet been able whether acting as an assignee, trustee in bankruptcy, or in any other capacity, to find a method or

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*It is reasonable to draw the inference that authority does not exist for the proposition asserted by the Appellees.

device to compel a transfer of a liquor license without complying with the conditions precedent for the payment of existing unpaid taxes. The contention by the Appellees is tantamount to saying that even though the Trustee in Bankruptcy could have realized no greater sum; nevertheless, an Assignee for the benefit of creditors or an agent of the Assignor, is burdened with a greater duty and responsibility.

Respectfully submitted,

MAX SISENWEIN, and
DOROTHY KENDALL,
By MAX SISENWEIN,
Attorneys for Appellant.

No. 16459

United States Court of Appeals

for the Ninth Circuit

RALPH MEYER,

Appellant,

vs.

IRVING I. BASS, Trustee in Bankruptcy of the Estate of Vensep, Inc., etc., Bankrupt, and DIVISION OF LABOR LAW ENFORCEMENT,

Appellees,

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Transcript of Record

Appeals from the United States District Court for the Southern District of California Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Southern District of California, Central Division

No. 80333-WM

In the Matter of:

VENSEP, INCORPORATED, d/b/a YOUR HOST and Also d/b/a CLUB NOCTURNE,

Alleged Bankrupt.

PETITION IN INVOLUNTARY BANKRUPTCY

To the Honorable Judges of the United States District Court, in and for the Southern District of California:

The petition of Ted Mossman, Barbara Lake, and Bettye Horsley, respectfully represents and shows:

I.

That Vensep, Inc., d/b/a Your Host, and also d/b/a Club Nocturne, has had its principal place of business at 3816 Sepulveda Boulevard, Culver City, California, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district; and owes debts to the amount of One Thousand Dollars ($1,000.00) or more; and is not a municipal, railroad, insurance or banking corporation, or a building and loan association, but is engaged in the restaurant and night club business.

II.

Your petitioners are creditors of the said alleged bankrupt, having provable and unsecured claims against it, liquidated as to amount and not contingent as to liability, amounting in the [2*] aggregate to Five Hundred Dollars ($500.00) or over, in excess of securities.

III.

That the claims of your petitioners are for services rendered by them to the said alleged bankrupt within two years last past, and are in the following amounts: Ted Mossman, $2,233.00; Barbara Lake, $34.80: Bettye Horsley, $56.00.

IV.

Your petitioners allege that the said Vensep, Inc., d/b/a Your Host, and also d/b/a Club Nocturne, committed an act of bankruptcy in that, within four months preceding the filing of this petition, the said Vensep, Inc., on May 29, 1957, made a general assignment for the benefit of its creditors to Ralph Meyer.

Wherefore, your petitioners pray that service of this petition, with subpoena, may be made upon the said alleged bankrupt as provided in the Bankruptcy Act, and that the said alleged bankrupt may be adjudged by this Court to be a bankrupt within the purview of said Act.

/s/ TED MOSSMAN.

/s/ BARBARA LAKE.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

/s/ BETTYE HORSLEY.

QUITTNER, STUTMAN & TREISTER,

By /s/ HERMAN L. GLATT,
Attorneys for Petitioning Creditors.

Duly Verified.

[Endorsed]: Filed July 17, 1957. Referee. [3]

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 17th day of July, 1957;

Whereas, a petition was filed in this court on the 17th day of July, 1957, against Vensep, Incorporated, d/b/a Your Host, and also d/b/a Club Nocturne alleged bankrupt above named, praying that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to Joseph J. Rifkind, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Vensep, Incorporated, d/b/a Your Host, and also d/b/a Club Nocturne shall henceforth attend before said referee and submit to such or-

ders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ LEON R. YANKWICH,
District Judge.

[Endorsed]: Filed July 17, 1957, U.S.D.C. [5]

[Title of District Court and Cause.]

ADJUDICATION OF BANKRUPTCY

At Los Angeles, Calif., in said District, on the 16th day of August, 1957.

The petition of Ted Mossman, Barbara Lake, and Bettye Horsley filed on the 17th day of July, 1957, that Vensep, Incorporated, d/b/a Your Host, and also d/b/a Club Nocturne be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposing interest; and the alleged bankrupt having failed to appear or plead within the time provided in the subpoena or otherwise;

It is adjudged that the said Vensep, Incorporated, d/b/a Your Host, and also d/b/a Club Nocturne, is a bankrupt under the Act of Congress relating to bankruptcy.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed August 16, 1957, Referee. [6]

[Title of District Court and Cause.]

REPORT AND ACCOUNT OF ASSIGNEE FOR BENEFIT OF CREDITORS

To the Honorable Joseph J. Rifkind, Referee in Bankruptcy:

Comes now Ralph Meyer, Assignee for benefit of creditors of the above-named debtor, and respectfully presents this, his report and account as Assignee for benefit of creditors:

I.

On May 29, 1957, the above-named debtor made, executed, and delivered to Petitioner a General Assignment for the benefit of its creditors, true and correct copy which is attached hereto, marked Exhibit "A," and incorporated herein as if at this point set forth verbatim.

II.

Petitioner took possession of the business premises of the debtor, insured the assets and caused a physical inventory thereof to be taken. Petitioner notified the taxing agencies, utility companies, and Labor Commissioner that the assignment had been made, and diverted the mail. Petitioner surrendered the liquor license, asset of this estate, to the Department of Alcoholic Beverage Control to be held for resale. [7]

III.

The debtor was in default under the lease for the business premises, and the lessor served notice of

said default and a demand to pay the delinquent amounts and terminating the lease.

IV.

The furniture, fixtures, and equipment were subject to a lien representing a portion of the original purchase price, and the unpaid balance thereof was in excess of $100,000.00. The value of the fixtures at liquidation was less than $15,000.00.

V.

It was impossible for Petitioner to offer the assets for sale as a going business because the lessor refused to make a lease with any prospective purchaser. Realizing the futility of retaining possession of the premises and fixtures any longer, Petitioner, through his counsel, negotiated a sale of whatever rights he might assert to the property for the sum of $300.00 plus a waiver of administration rent during the period of his occupancy. In Addition, the lessor and lien holder agreed to store the merchandise inventory for a reasonable time in order to permit Petitioner to make a favorable sale thereof. This storage was without rent, and the free storage was part of the consideration for Petitioner's surrendering possession of the premises to the lien holder and lessor expeditiously.

VI.

At first, the lessor offered only a nominal amount for the merchandise and supplies; but after being refused by Petitioner (who solicited bids from

many persons), the lessor substantially raised its bid; and the merchandise and supplies were sold for the sum of $960.05, which was the best bid for the merchandise and supplies that had originally been inventoried at $1,562.24. [8]

VII.

The only remaining asset was the on-sale liquor license, which Petitioner sold to the highest bidder for the sum of $5,800.00. In order that the license could be cleared for transfer to the purchaser, it was necessary that Petitioner pay in full the claims of the Department of Employment and the State Board of Equalization, payment of these claims being condition precedent to the transfer by the Department of Alcoholic Beverage Control of a liquor license.

VIII.

Petitioner retained Dorothy Kendall, attorney, to represent him in connection with the legal matters in this estate. Said attorney's petition will be filed separately.

IX.

Attached hereto, marked Exhibit "B," is a list of the receipts and disbursements handled by Petitioner during the assignment administration.

X.

Petitioner paid to himself the sum of $423.70 as fee, being 6% of the gross moneys received in the estate, without regard to the additional asset re-

ceived, being a waiver of administration rent amounting to approximately $900.00. Petitioner incurred expenses in the sum of $141.10 for clerical, secretarial, telephone, stamps, stationery, and storage.

XI.

No agreement has been made, directly or indirectly, and no understanding exists for a division of fees between Petitioner and any other person, or at all.

Wherefore, Petitioner prays that an Order be made and entered herein approving, allowing, and settling this, his First and Final Report and Account, including the fees and reimbursement of expenses paid to himself in the total sum of $564.80 and [9] costs of administration; and for such other and further relief as to the Court seems just.

Dated: December 5, 1957.

/s/ RALPH MEYER,
Assignee for Benefit of
Creditors. [10]

EXHIBIT A

General Assignment

This Assignment, made this 29th day of May, 1957, between Vensep, Inc., a corporation, of Culver

City, California, hereinafter referred to as Assignor, Ralph Meyer of Los Angeles, California, hereinafter referred to as Assignee.

Witnesseth: That whereas the said Assignor is indebted to divers persons, and is desirous of providing for the payment of same, so far as is in his power, by an assignment of all his property for that purpose:

Now Therefore, the undersigned, Vensep, Inc., as Assignor, for a valuable consideration, receipt of which is hereby acknowledged, does hereby make the following General Assignment for the benefit of Assignor's creditors to Ralph Meyer, as Assignee, of Los Angeles, California, under the following terms and conditions:

1. Assignor does hereby grant, bargain, sell, assign, and transfer to Assignee, his successors and assigns, in trust for the ultimate benefit of Assignor's creditors generally, all of the property of the Assignor of every kind and nature and wheresoever situated, whether in possession, reversion, remainder, or expectancy, both real and personal, and any interest or equity therein not exempt from execution; included therein are all stock of merchandise, store furniture and fixtures, machinery, equipment, raw materials, merchandise in process, book accounts, books, accounts receivable, cash on hand, all choses in action (personal or otherwise), insurance policies, and all other personal property of every kind and nature involved in that certain

restaurant known as Vensep, Inc., located at 3816 South Sepulveda Blvd., now owned and conducted by Assignor in the City of Culver City, County of Los Angeles, State of California; excepting the leases of realty and leasehold interests in real property, unless and until mutually acceptable arrangements are made between lessors and Assignee.

2. This Assignment constitutes a grant deed to all real property owned by Assignor, whether or not said real property is specifically described herein. Certain of said real property is more specifically described in Exhibit "A," attached hereto and made a part hereof by reference, as though set forth verbatim. (Exhibit "A" attached; Yes ☐ No ☒).

3. Assignor agrees to deliver to Assignee all books of account and records showing the names and addressess of all creditors, to execute and deliver all additional necessary documents immediately upon request by Assignee, and to endorse all indicias of ownership where required by Assignee, in order to complete the transfer of all assets to Assignee as intended by this Assignment including, but not limited to, all of Assignor's real and personal property and/or Assignor's interest therein including mortgages, deeds of trust, motor vehicles and patent rights where permitted by law or custom. Assignee is hereby authorized to execute all endorsements and demands requiring Assignor's signature, in the name of Assignor. Assignor fur-

ther authorizes Assignee to apply for any deposits, refunds (including specifically, among all others, claims for refund of income taxes paid) or claims wherever necessary, in the name of Assignee; Assignee is authorized to direct all Assignor's United States mail to be delivered to Assignee, and Assignee is expressly authorized and directed to open said mail as agent of Assignor; and to do any thing or act which the Assignee in his sole and arbitrary discretion deems necessary or advisable to effectuate the purposes of this assignment.

4. In the event the Assignor is engaged in the sale of alcoholic beverages, this assignment does not include transfer of any alcoholic beverages, but the Assignor hereby appoints the Assignee as his agent for the sole purpose of filing an application for a permit for the sale of the alcoholic beverages in the said place of business and/or sale of said alcoholic beverage licenses (said Assignee being vested with absolute discretion in regard thereto, and assuming no liability by reason thereof), and Assignor hereby assigns to Assignee all of the proceeds of such sale for the benefit of his creditors generally in accordance with the terms of this assignment.

5. Assignor and Assignee agree to the following:

(a) This instrument transfers legal title and possession to Assignee of all of said hereinabove described assets, and after taking actual custody thereof, Assignee, in his own discretion, may determine whether to continue all, or part, of the

business operations, or to liquidate said assets; if Assignee deems it advisable he may operate the business, and, after paying in full all claims of creditors, return the remainder, if any, to Assignor.

(b) Assignee, at his discretion, may sell and dispose of said assets upon such terms and conditions as he may see fit, at public or private sale; Assignee shall not be personally liable in any matter, and Assignee's obligations shall be in a representative capacity, only, as an Assignee for the general benefit of Assignor's creditors. Said Assignee shall administer this estate to the best of his ability but it is expressly understood that he, his agents, servants or employees shall be liable only for reasonable care and diligence in said administration, and he shall not be liable for any act or thing done by him, his agents, servants or employees in good faith in connection herewith.

(c) From the proceeds of sale, collections or operations, Assignee shall pay to himself as Assignee all of his charges and expenses, including his own reasonable remuneration and that of his agents and his attorney, as well as a reasonable fee to Assignor's attorney; all of said amounts to be determined at Assignee's reasonably exercised and sole discretion.

(d) Assignee may compromise claims, complete or reject Assignor's executory contracts, discharge at his option any liens on said assets and any indebtedness which under law is entitled to priority

of payment; Assignee shall have the power to borrow money, hypothecate and pledge the assets, and to do all matters and things that said Assignor could have done prior to this assignment. Any act or thing done by Assignee hereunder shall bind the assignment estate and the Assignee only in his capacity as assignee for the benefit of creditors.

(e) Assignor agrees (that provided any such may, by operation of law be not assignable), to make any and all claims for refund of taxes which may be due from the Director of Internal Revenue for income tax refunds, or otherwise, and to forthwith upon receipt of any such refunds pay them over to Assignee, and hereby empowers Assignee, as attorney in fact of Assignor, to make all claims for refunds which may be made by an attorney in fact.

(f) After paying all costs and expenses of administration as hereinabove set forth, and all allowed priority claims, Assignee shall distribute to all unsecured creditors, pro rata, the remaining net proceeds of this assignment estate; said payments to be made until all assets are exhausted, or these creditors are paid, or settled, in full; thereafter, the surplus of moneys and property, if any, to be transferred and conveyed to Assignor.

Accepted this 29th day of May, 1957.

/s/ RALPH MEYER,
Assignee.

VENSEP, INC.,
A Corporation, Assignor;

By /s/ CARLTON RAKER,
President;

/s/ ISABELLE BAKER,
Wife of Assignor, 4550 Clybourn Avenue, Burbank, California. [11]

Corporation

State of California,
County of Los Angeles—ss.

On this 29th day of May, 1957, before me, the undersigned Notary Public in and for said County and State, personally appeared Carlton Baker known to me to be the President and Isabelle Baker known to me to be the Secretary of the Vensep, Inc., the corporation which executed the within Assignment, known to me to be the persons who executed same on behalf of said corporation, and acknowledged to me that said corporation executed same.

Witness my hand and official seal.

[Seal] /s/ J. ROBERT GALINDO,
Notary Public in and for
said County and State.

EXHIBIT B

Assignee's Account
Receipts

Quitclaim to personal property	$ 300.00
Sale of liquor license	5,800.00
Sale of merchandise and supplies	960.05
Telephone refund	1.78
Total Receipts	$7,061.83

Disbursements

Jack's Key Shops—change of locks	$ 19.17
I. Bales—inventory and adjuster services	73.68
Recordation, signs, file	16.40
So. Calif. Water Co.—administration utility	6.70
Department of Employment—claim against debtor	1,655.08
State Board of Equalization—claim against debtor	1,746.30
Richard S. Johnston—insurance	105.27
Ralph Meyer—assignee fee	423.70
Ralph Meyer—office expense: clerical, secretarial, stamps, stationery, storage, telephone	141.10
Dorothy Kendall—on account, attorney for assignee	250.00
Irving I. Bass, Trustee—balance of funds	2,624.43
Total Disbursements	$7,061.83

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 9, 1957, [12] Referee.

[Title of District Court and Cause.]

PETITION OBJECTING TO REPORT AND ACCOUNT OF ASSIGNEE AND SEEKING SURCHARGE AGAINST ASSIGNEE AND ATTORNEY FOR ASSIGNEE AND FOR ORDERS TO SHOW CAUSE THEREON

The Petition of Irving I. Bass respectfully shows and alleges:

I.

That your Petitioner is the duly elected, qualified and acting Trustee in Bankruptcy herein.

II.

That on May 29, 1957, the above-named Bankrupt made an assignment for the benefit of its creditors to one Ralph Meyer as Assignee.

III.

That on July 17, 1957, and within four months of the execution of the aforementioned assignment an involuntary petition in bankruptcy was filed against Vensep, Inc., d/b/a Your Host, and also Club Nocturne. That said Vensep, Inc., d/b/a Your Host, and also Club Nocturne, was adjudicated bankrupt by an Order of this Court dated August 16, 1957.

IV.

That at the time of executing the said general assignment [14] for the benefit of its creditors the

Bankrupt was indebted to various of its employees for services rendered to said Bankrupt within ninety days prior to the execution of the assignment as aforesaid. That subsequent to the execution of said general assignment and prior to the inception of these proceedings Ralph Meyer as Assignee was duly advised that there were substantial sums of money owing by the Bankrupt to its employees.

V.

That during the course of said assignment the Assignee paid over to himself the sum of $423.70 by way of fees and the sum of $141.10 by way of reimbursement for expenses incurred by him. That said Assignee paid over to one Dorothy Kendall the sum of $250.00 for services rendered by said Dorothy Kendall to him as attorney. That in addition, the said Assignee made the following additional disbursements:

Jack's Key Shops—change of locks	$ 19.17
I. Bales—inventory and adjuster services	73.68
For recordation, signs and files	16.40
Southern California Water Company administration utilities	6.70
Richard S. Johnston, insurance	105.27

VI.

That it is the position of your Petitioner that the monies paid as aforesaid by the Assignee to himself for his fees and reimbursement of his ex-

penses and the monies paid by said Assignee to Dorothy Kendall and the various other persons hereinabove named are assets of this estate and recoverable pursuant to the provisions of Section 2a(21) of the Bankruptcy Act in that said disbursements, by virtue of the provisions of Section 1204 of the Code of Civil Procedure of the State of California, were subordinate to the lien rights of those employees of the Bankrupt entitled to priority pursuant to said Section 1204 of the Code of Civil Procedure. That [15] your Petitioner has succeeded to the lien rights of said employees.

Wherefore, your Petitioner prays that Orders to Show Cause be issued herein and directed to the said Ralph Meyer at 225 South Oxford Avenue, Los Angeles 5, California, and to the said Dorothy Kendall at 225 South Oxford Avenue, Los Angeles 5, California. That the said Ralph Meyer and Dorothy Kendall be and appear before this Court at its courtroom on a day certain, then and there to show cause, if any they have, why it should not be decreed that the report and account of the said Ralph Meyer heretofore filed in these proceedings be disallowed and why it should not further be decreed that the said Ralph Meyer be ordered and directed to turn over to this estate those monies heretofore enumerated which were paid by said Ralph Meyer to himself by way of fees and reimbursement and to those third persons heretofore listed, and that the said Dorothy Kendall be ordered and directed to turn over to this Court

the sum of $250.00 heretofore paid to her as attorneys fees by said Assignee.

QUITTNER, STUTMAN & TREISTER,

By /s/ HERMAN L. GLATT,
Attorneys for Irving I. Bass.

Duly Verified.

[Endorsed]: Filed July 17, 1958, Referee. [16]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE RE PETITION OBJECTING TO ASSIGNEE'S ACCOUNT AND REPORT AND SEEKING SURCHARGE AGAINST ASSIGNEE AND ATTORNEY FOR ASSIGNEE

At Los Angeles, in Said District, on the 17th day of July, 1958.

Upon reading and filing the verified petition of Irving I. Bass, the Trustee in Bankruptcy herein, and good cause appearing therefor, it is

Ordered that Ralph Meyer and Dorothy Kendall and Division of Labor Law Enforcement of California be and appear before this Court in its courtroom, No. 330, Federal Building, Temple and Spring Streets, Los Angeles, California, on the 30th day of July, 1958, at 10:00 o'clock a.m., then and there to show cause, if any they have, why the prayer of

the said Petitioner should not be granted; and it is further

Ordered that if service upon said Ralph Meyer be made by mail that it shall be sufficient to address the envelope to said Ralph Meyer at 225 South Oxford Avenue, Los Angeles 5, California, and that if service upon said Dorothy Kendall be made by mail that it shall be sufficient to address the envelope to said Dorothy Kendall at 225 South Oxford Avenue, Los Angeles 5, California; and it is finally [18]

Ordered that if the Respondents herein, or either of them, desire to contest the Petition upon which this Order to Show Cause is based, then said Respondents, or either of them, shall file with this Court their answer or other pleading thereto not later than two days before the date set for hearing herein and shall serve a copy of said answer or other pleading upon Quittner, Stutman & Treister, 639 South Spring Street, Los Angeles 14, California, Attorneys for the Trustee herein.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed July 17, 1958, Referee. [19]

[Title of District Court and Cause.]

PETITION RE OBJECTIONS TO REPORT AND ACCOUNT OF ASSIGNEE FOR BENEFIT OF CREDITORS AND FOR ORDER TO SHOW CAUSE THEREON

To the Honorable Joseph J. Rifkind, Referee in Bankruptcy:

The petition of the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, respectfully shows and alleges:

I.

That your petitioner holds assignments of the claims of various former employees of the above-named bankrupt for wages earned within the ninety day period preceding May 29, 1957, and that a Proof of Priority Wage Claim in the sum of $7,662.85 on behalf of said employees by virtue of Section 64a(2) of the Bankruptcy Act has been filed by your petitioner in the bankruptcy proceedings herein. [20]

II.

That on May 29, 1957, the above-named bankrupt made an assignment for the benefit of its creditors to one Ralph Meyer.

III.

That on July 17, 1957, and within four months of the execution of the aforementioned assignment, an involuntary petition in bankruptcy was filed against the bankrupt herein and an order of ad-

judication in bankruptcy was made by this Court on August 16, 1957.

IV.

That at the time of the execution of the above assignment for the benefit of its creditors to one Ralph Meyer, the bankrupt was indebted to petitioner's assignors for services rendered to said bankrupt within ninety days prior to the execution of the assignment as set forth in Proof of Priority Wage Claim of your petitioner on file herein; that the said Ralph Meyer as assignee was duly advised of the existence of the said priority wage claims upon the execution of the said general assignment and prior to the commencement of the bankruptcy proceedings herein.

V.

That during the course of the assignment for the benefit of creditors of the bankrupt herein, the assignee made the following disbursements: [21]

Jack's Key Shops; change of locks	$ 19.17
I. Bales; inventory and adjuster services	73.68
Recordation, signs, file	16.40
So. Cal. Water Co.; administration utility	6.70
Dept. of Employment; claim against debtor	1,655.08
State Bd. of Equalization; claim against debtor	1,746.30
Richard S. Johnston; insurance	105.27
Ralph Meyer; assignee fee	423.70
Ralph Meyer; office expense: clerical, secretarial, stamps, stationery, storage, phone	141.10
Dorothy Kendall; on account, attorney for assignee	250.00
Total Disbursements	$4,437.40

VI.

That it is the position of your petitioner that the payments made by the said assignee as aforesaid to the Department of Employment of the State of California and to the Board of Equalization of the State of California were improperly made for the reason that the said payments constituted preferences within the purview of Section 60 of the Bankruptcy Act, and for the further reason that by virtue of the provisions of Section 6756 of the California Revenue and Taxation Code and Section 1702 of the California Unemployment Insurance Code, the tax claims of the said State agencies are made subordinate to the prior labor claims of the assignors of your petitioner.

VII.

That it is the position of your petitioner that all of the disbursements made by the assignee to himself and otherwise as set forth in Paragraph V herein were improper for the reason that the said disbursements were subordinate to the lien rights of the priority wage claims of the assignors of your petitioner pursuant to the provisions of Section 1204 of the California Code of Civil Procedure.

Wherefore, your petitioner prays that an order to show cause be issued herein and directed to said Ralph Meyer at 225 South Oxford Avenue, Los Angeles 5, California, and that the said Ralph Meyer be ordered to appear before this Court on a day certain, then and there to show cause, if any, why it should not be decreed that the report and

account of the said Ralph Meyer heretofore filed in these proceedings be disallowed, and why it should not further be decreed that the said Ralph Meyer be ordered and directed to turn over to this estate those monies heretofore enumerated which were disbursed by the said [22] Ralph Meyer in the sum of $4,437.40.

Dated: July 17, 1958.

PAULINE NIGHTINGALE and
CONRAD LEE KLEIN,

Attorneys for Division of Labor Law Enforcement, Petitioner,

By /s/ PAULINE NIGHTINGALE.

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 17, 1958, Referee. [23]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE RE PETITION OF DIVISION OF LABOR LAW ENFORCEMENT OBJECTING TO ASSIGNEE'S ACCOUNT AND REPORT AND SEEKING SURCHARGE AGAINST ASSIGNEE

At Los Angeles, in Said District, on the 17th Day of July, 1958.

Upon reading and filing the verified petition of Division of Labor Law Enforcement, Department of Industrial Relations, State of California, and good cause appearing therefor, it is

Ordered that Ralph Meyer and Irving I. Bass, trustee in bankruptcy be and appear before this Court in its courtroom, No. 330 Federal Building, Temple and Spring Streets, Los Angeles, California, on the 30th day of July, 1958, at 10:00 a.m., then and there to show cause, if any he has, why the prayer of the said Petitioner should not be granted; and it is further

Ordered that if service upon said Ralph Meyer be made by mail that it shall be sufficient to address the envelope to said Ralph Meyer at 225 South Oxford Avenue, Los [26] Angeles 5, California; and Irving I. Bass, trustee in bankruptcy, by mail also and it is finally

Ordered that if the Respondent herein desires to contest the Petition upon which this Order to Show Cause is based, then said Respondent shall file with this Court his answer or other pleading thereto not later than two days before the date set for hearing herein and shall serve a copy of said answer or other pleading upon Pauline Nightingale and Conrad Lee Klein, attorneys for Division of Labor Law Enforcement, Department of Industrial Relations, State of California, 405 California State Building, 217 West First Street, Los Angeles 12, California, Petitioner herein.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed July 17, 1958, Referee. [27]

[Title of District Court and Cause.]

ANSWER TO PETITION RE OBJECTIONS TO REPORT AND ACCOUNT OF ASSIGNEE FOR BENEFIT OF CREDITORS

To the Honorable Joseph J. Rifkind, Referee in Bankruptcy:

Comes now Ralph Meyer, Assignee for benefit of creditors of the above-named bankrupt, and, by way of answer to Petition re Objections to Report and Account of Assignee for Benefit of Creditors, respectfully represents as follows:

I.

Answering Paragraph I, Respondent does not have sufficient information to enable him to answer the allegations contained therein and, basing his denial upon said ground, denies that the sum of $7,662.85, or any other sum, is the aggregate of labor claims entitled to priority.

II.

Answering Paragraph IV, Respondent denies each and every allegation contained therein.

III.

Answering Paragraph VI, Respondent denies each and every allegation contained therein; and further alleges that the [28] payments made by Respondent to said Department of Employment and State Board of Equalization were made in accordance with Section 24049 of the Business and Pro-

fessions Code of the State of California, and Respondent further alleges that the provisions of said Section prevail over all other laws of the State of California.

In this connection, Respondent alleges that a licensee or one entitled to the benefits of a liquor license issued by the Department of Alcoholic Beverage Control takes and holds such liquor license subject to the provisions of the California Business and Professions Code, Section 24049, and by reason thereof, is entitled only to such proceeds of sale of any such license in excess of the claims which are entitled to priority according to the provisions of said Section.

IV.

Answering Paragraph VII, Respondent denies each and every allegation contained therein; and further alleges that Sections 3466 and 3467 of the Revised Statutes of the United States prevail; that under general assignments for the benefit of creditors, the claims of the Director of Internal Revenue take priority over the labor lien claimants, whose rights arise in accordance with Section 1204 of the Code of Civil Procedure of the State of California.

Respondent further alleges that the claim asserted by the Director of Internal Revenue in the above-entitled proceeding amounts to a sum in excess of $14,000.00. That the gross sums received by the Assignee from liquidation of assets in the assignment estate were substantially less than said sum.

That all moneys, therefore, over and above the fees and expenses of the administration of the assignment estate, were payable and due to the Director of Internal Revenue on account of its claim.

Wherefore, Respondent prays that the Petition as filed [29] herein be dismissed; that it be adjudged that the Objectors have no lien rights or any rights to assert as Objectors; that the liens of the labor claimants, Objectors herein, be decreed to be subordinate to the liens of the Department of Employment and State Board of Equalization, as set forth in the California Business and Professions Code, Section 24049, and subordinate to the claim of the Director of Internal Revenue, as set forth in Sections 3466 and 3467 of the Revised Statutes of the United States.

Dated: July 24, 1958.

/s/ RALPH MEYER,
Assignee for Benefit of Creditors of Vensep, Inc.,
Respondent.

/s/ DOROTHY KENDALL,
Attorney for Respondent.

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 25, 1958, Referee. [30]

[Title of District Court and Cause.]

ANSWER TO PETITION OBJECTING TO REPORT AND ACCOUNT OF ASSIGNEE AND SEEKING SURCHARGE AGAINST ASSIGNEE AND ATTORNEY FOR ASSIGNEE

To the Honorable Joseph J. Rifkind, Referee in Bankruptcy:

Comes now Ralph Meyer, Assignee for benefit of creditors of the above-named bankrupt, and, by way of answer to Petition Objecting to Report and Account of Assignee and Seeking Surcharge Against Assignee and Attorney for Assignee, respectfully represents as follows:

I.

Answering Paragraph IV, Respondent denies each and every allegation contained therein.

II.

Answering Paragraph VI, Respondent denies each and every allegation contained therein; and further alleges that Sections 3466 and 3467 of the Revised Statutes of the United States prevail; that under general assignments for the benefit of creditors, the claims of the Director of Internal Revenue take priority over the labor lien claimants, whose rights arise in accordance with Section 1204 of the Code of Civil Procedure [32] of the State of California.

Respondent further alleges that the claim asserted by the Director of Internal Revenue in the above-entitled proceeding amounts to a sum in excess of $14,000.00. That the gross sums received by the Assignee from liquidation of assets in the assignment estate were substantially less than said sum. That all moneys, therefore, over and above the fees and expenses of the administration of the assignment estate, were payable and due to the Director of Internal Revenue on account of its claim.

Wherefore, Respondent prays that the Petition as filed herein be dismissed; that it be adjudged that the Objectors have no lien rights or any rights to assert as Objectors; that the liens of the labor claimants be decreed to be subordinate to the claim of the Director of Internal Revenue, as set forth in Sections 3466 and 3467 of the Revised Statutes of the United States.

Dated: July 28, 1958.

/s/ RALPH MEYER,
Assignee for Benefit of Creditors of Vensep, Inc.,
Respondent.

/s/ DOROTHY KENDALL,
Attorney for Respondent.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 29, 1958, Referee. [33]

Dorothy Kendall
Attorney at Law
225 South Oxford Avenue
Los Angeles 4, California

October 14, 1958.

Hon. Joseph J. Rifkind,
Referee in Bankruptcy,
Federal Building,
Los Angeles 12, California.

Re: Vensep, Inc., d/b/a Your Host,
and Also Club Nocturne,
Bankruptcy No. 80,333-WM.

Dear Referee Rifkind:

I have been served with a copy of the proposed Findings of Fact, Conclusions of Law, and Order in the above matter, and would like to make the following comments and suggestions with respect to modifying and correcting the Findings of Fact:

1. Finding No. III should be amplified to include the following: "The indebtedness of Vensep, Inc., to the Department of Employment of the State of California, and to the Board of Equalization of the State of California was incurred from and in connection with the operation of a business by Vensep, Inc., licensed by the Department of Alcoholic Beverage Control of the State of California; that the said Department of Employment of the State of California and Board of Equalization of the State of California requested that said Depart-

ment of Alcoholic Beverage of the State of California withhold transfer of the liquor license to the buyer thereof pending payment in full of the aforesaid indebtedness incurred by Vensep, Inc.; that the Department of Alcoholic Beverage Control of the State of California honored said 'withhold' on transfer of license and required, as condition precedent to transfer of license, the payment by Ralph Meyer, Assignee, to the said Department of Employment and Board of Equalization the sums due to said agencies from Vensep, Inc., the Assignor."

2. Finding No. IV should be amplified to include the following: "That Ralph Meyer, Assignee, paid the aforesaid sums to the aforenamed payees for services rendered by said respective payees in the reasonable preservation, care and conservation of the assets of Vensep, Inc., Assignor."

3. Finding No. VI should be amplified to include the following: "That no claim was filed with Ralph Meyer, Assignee, either by or on behalf of the employees of Vensep, Inc., Assignor, for wages earned and unpaid to said employees at any time at all. That no notice was given to Ralph Meyer, Assignee, by or on behalf of the said employees of Vensep, Inc., Assignor, of the existence of any claim for unpaid wages."

As undoubtedly you must realize, it is my full intention to, on behalf of Ralph Meyer, Assignee, appeal from your decision, and in view of this we

believe it essential that the Findings of Fact at least reflect the true facts and that they be complete in so reflecting the facts.

If your Honor is in accord with my opinion I will be pleased to prepare and file Findings of Fact in conformity with the foregoing suggestion.

Respectfully,

/s/ DOROTHY KENDALL.

DK:ecp.

cc: Quittner, Stutman & Treister, Pauline Nightingale, Conrad Lee Klein and Joseph Abihider.

Received October 15, 1958, Referee. [76]

Quittner, Stutman & Treister
Attorneys at Law
639 South Spring Street
Los Angeles 14, California

October 16, 1958.

Hon. Joseph J. Rifkind,
Referee in Bankruptcy,
Federal Building,
Temple & Spring Streets,
Los Angeles 12, California.

Re: Vensep, Inc., d/b/a Your Host and Also Club Nocturne, No. 80,333-WM.

Dear Referee Rifkind:

This office has received a copy of the letter of October 14, 1958, sent to you by Miss Kendall. After examining the contents of said letter we feel that we would have no objection whatsoever to the amplifications proposed by Miss Kendall to Finding No. III and Finding No. IV. However, as to the amplification proposed for Finding No. VI, we would object to same for the reason that we feel that the notice question is completely immaterial to the issues involved, and for the further reason that to the best of our knowledge the Assignee on a number of occasions communicated with the Division of Labor Law Enforcement relative to labor claims earned within 90 days of the making of the assignment.

Very truly yours,

QUITTNER, STUTMAN & TREISTER,

By /s/ HERMAN L. GLATT.

HLG:ep.

cc: Miss Dorothy Kendall, Mrs. Pauline Nightingale.

Received October 17, 1958, Referee. [77]

State of California
Department of Industrial Relations

Division of Labor Law Enforcement

Please Address Reply to 405 State Building, Civic Center, Los Angeles 12, California.

October 15, 1958.

File No.: Civil 5710.

Hon. Joseph J. Rifkind,
Referee in Bankruptcy,
Federal Building,
Los Angeles 12, Calif.

Dear Referee Rifkind:

Re: Vensep, Inc., d/b/a Your Host, and Also Club Nocturne, Bankruptcy No. 80,333-WM.

This Division respectfully objects to the proposed modifications of the findings of fact in the above matter requested by counsel for Ralph Meyer, Assignee. The requested amplification of Finding No. VI is not material. Under the provisions of Section 1204 of the California Code of Civil Procedure no claim is required to be filed with the assignee, nor notice given. At the time this matter was heard, counsel for the assignee also asserted that notice of the labor claims was immaterial. Furthermore, the proposed modification does not reflect the true facts.

The records of the Labor Commissioner show that the assignee had notice of the existence of the

unpaid prior wage claims. A letter dated June 20, 1957, was received by the Labor Commissioner from Ralph Meyer, Assignee, advising of the assignment for benefit of creditors by Vensep, Inc. On July 12, 1957, the deputy labor commissioner handling the case discussed the claims by telephone with a Mr. Galindo of Ralph Meyer's office, and on July 17, 1957, the assignee was advised by letter that a hearing would be scheduled for July 31, 1957. Subsequently, a Miss Sorkin of Ralph Meyer's office advised this Division that all payroll records pertaining to the wage claims had been turned over by the assignee to the trustee in bankruptcy. It appears from the foregoing that there can be no doubt that the assignee had knowledge and notice of the existence of the wage claims.

Respectfully yours,

PAULINE NIGHTINGALE,
CONRAD LEE KLEIN,
JOSEPH ABIHIDER,

By /s/ PAULINE NIGHTINGALE,
Attorneys for Labor
Commissioner.

PN:GFD.

cc to: Dorothy Kendall, Attorney; Quittner, Stutman & Treister, Attorneys.

Received October 17, 1958, Referee. [78]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER RE OBJECTIONS TO ASSIGNEE'S REPORT AND ACCOUNT

At Los Angeles, in Said District on the 23rd Day of October, 1958.

This matter came on to be heard before the undersigned Referee in Bankruptcy, on the 30th day of July, 1958, at 10:00 o'clock a.m., in his courtroom, No. 330, Federal Building, Temple and Spring Streets, Los Angeles, California, upon petitions filed by the Trustee in Bankruptcy herein and by the Division of Labor Law Enforcement objecting to the report and account of Ralph Meyer as Assignee and seeking a surcharge against said Ralph Meyer for certain disbursements made by him as Assignee. The Trustee in Bankruptcy herein, Irving I. Bass, appeared in person and by and through his attorneys, Quittner, Stutman & Treister by Herman L. Glatt. The Division of Labor Law Enforcement appeared by and through its attorneys, Pauline Nightingale, Conrad E. Klein and Joseph Abihider by Pauline Nightingale. Respondent, Ralph Meyer, appeared in person and by and through his attorney, Dorothy Kendall.

It appearing that the parties having stipulated to the facts involved in the instant proceeding, and the Court having heard the [79] statements of counsel, having considered the evidence presented,

having studied the memoranda filed by counsel, and being fully advised in the premises,

Now, Therefore, this Court does hereby make its Findings of Fact and Conclusions of Law and Order as follows:

Findings of Fact

I.

That prior to May 29, 1957, Vensep, Inc., d/b/a Your Host and also Club Nocturne (hereinafter referred to as Vensep, Inc.), was engaged in the business of operating a restaurant and cocktail lounge. That on May 29, 1957, Vensep, Inc., executed a general assignment for the benefit of its creditors to one Ralph Meyer as Assignee. That at the time of the making of said general assignment, Vensep, Inc., was insolvent within the meaning of that term as it is set forth in Section 1 (19) of the Bankruptcy Act.

II.

That on July 17, 1957, a date within four months of the execution of the assignment to Ralph Meyer as aforesaid, an involuntary petition in bankruptcy was filed against Vensep, Inc., by certain of its creditors. That an order adjudicating Vensep, Inc., a bankrupt was entered by this Court on August 16, 1957.

III.

That during the pendency of said assignment, Ralph Meyer entered into the sale of a certain

on-sale liquor license standing in the name of Vensep, Inc., for the sum of $5,800.00. That in connection with the transfer of said on-sale liquor license to the purchaser, Ralph Meyer paid out of the $5,800.00 proceeds realized the sum of $1,655.08 to the Department of Employment of the State of California and the sum of $1,746.30 to the Board of Equalization of the State of California, said Department of Employment and Board of Equalization being aware of Meyer's capacity as Assignee of Vensep, Inc., at the time of said payments to them. That the monies paid by [80] Ralph Meyer to the Department of Employment of the State of California and to the Board of Equalization of the State of California represented the total indebtedness then owing to said agencies by Vensep, Inc. That the Department of Alcoholic Beverage Control required payment of said sums as a condition precedent to the transfer of said license.

IV.

That, additionally, during the pendency of the assignment, Ralph Meyer paid to himself an assignee's fee of $423.70 and paid to Dorothy Kendall, in her capacity as his attorney, the sum of $250.00. Said payments were made out of the assets of Vensep, Inc., then in the hands of Ralph Meyer as Assignee. That, further, from the assets of Vensep, Inc., then in his possession, Ralph Meyer made the following additional payments:

Jack's Key Shops—change of locks	$ 19.17
I. Bales—inventory and adjustor services	73.68

Recordation, signs and files	16.40
Southern California Water Company—administration utilities	6.70
Richard S. Johnston—insurance	105.27
Ralph Meyer—office expenses: clerical, secretarial, stamps, stationery, storage, telephone	141.10

V.

That subsequent to the inception of the instant proceeding, Ralph Meyer turned over to the Trustee in Bankruptcy herein the sum of $2,624.43, said sum being the balance remaining in his hands after deducting from the total monies realized through disposition of all the assets of Vensep, Inc., those aforementioned sums paid by him.

VI.

That as of May 29, 1957, the date of the assignment to Ralph Meyer as aforesaid, there was owing by Vensep, Inc., to various of its former employees the sum of $7,662.85 by way of wages and salaries for services rendered by said employees to Vensep, Inc., within the ninety-day period immediately prior to May 29, 1957. That as of May 29, 1957, Vensep, Inc., was indebted to the United States for taxes [81] owing in the sum of approximately $7,000.00.

Conclusions of Law

I.

That all of the claims paid and disbursements made by Ralph Meyer as Assignee of Vensep, Inc., from and after May 29, 1957, as hereinabove enu-

merated, were and are subordinate in priority of payment to the wage claims of the debtor now bankrupt in the sum of $7,662.85 and the lien thereof under Section 1204 of the Code of Civil Procedure of the State of California.

That the Trustee in Bankruptcy herein should have and recover judgment against Respondent, Ralph Meyer, for said improper disbursements in the sum of $4,437.40.

III.

That from and after the execution of the general assignment by Vensep, Inc., to Ralph Meyer on May 29, 1957, pursuant to the provisions of Section 1204 of the California Code of Civil Procedure, a lien in the sum of $7,662.85 arose and existed in favor of former employees of Vensep, Inc., as against all funds of Vensep, Inc., in the hands of Ralph Meyer as Assignee. That while said lien, pursuant to the provisions of Section 67c(2) of the Bankruptcy Act, is invalid as against the Trustee in Bankruptcy herein, said lien is capable of preservation by the Trustee herein for the benefit of this Estate.

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is

Ordered, Adjudged and Decreed:

I.

That the report and account of Ralph Meyer as Assignee heretofore filed in these proceedings be

and the same is hereby disapproved and said assignee is surcharged in the sum of $4,437.40.

II.

That the Trustee in Bankruptcy herein have and recover judgment against the assignee, Ralph Meyer, in the sum of $4,437.40 together with interest thereon from July 17, 1958, the date of the filing of Trustee's petition herein, until said judgment is paid in full. [82]

III.

That that certain lien in the sum of $7,662.85 arising in favor of former employees of Vensep, Inc., from and after May 29, 1957, as against the funds of Vensep, Inc., in the hands of Ralph Meyer be and the same is hereby preserved in the favor of this Estate and the Trustee in Bankruptcy thereof as against the Respondent, Ralph Meyer.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

Affidavit of Service by Mail attached.

Received October 10, 1958.

[Endorsed]: Filed October 23, 1958, [83] Referee.

[Title of District Court and Cause.]

PETITION FOR EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR REVIEW OF ORDER OF REFEREE AND ORDER

Comes now Ralph Meyer, Petitioner, and respectfully represents as follows:

I.

Proposed Findings of Fact, Conclusions of Law, and Order were served upon Petitioner by service on his counsel on October 10, 1958.

II.

On October 14, 1958, Petitioner, through his counsel, requested of said Referee, by letter, amplification and modification of said Findings of Fact; and, thereafter, awaited word from the Honorable Referee with respect to the proposed amplifications and modifications.

On November 6, 1958, not having heard, Petitioner, through his counsel, respectfully inquired of the Referee concerning the decision of the Referee with respect to said modifications; and learned, on November 12, 1958, that the Order [85] had been made on October 23, 1958.

III.

Petitioner alleges that in all good faith he believed that notice would have been given to him with respect to the making of the Order, and that

he withheld earlier inquiry lest he be deemed inopportune in pressing the Referee for a decision.

IV.

At all times, Petitioner intended to apply for a review of the Order of the Referee, and requests leave to file the Petition for Review which is attached hereto.

Wherefore, Petitioner prays that an Order be made and entered herein granting him an extension of time within which to file Petition for Review of the Order of the Referee.

Dated: November 21, 1958.

/s/ RALPH MEYER,
Petitioner.

/s/ DOROTHY KENDALL,
Attorney for Petitioner.

Order

Denied, see Sec. 39c of Bankruptcy Act, Brookay v. King (9 Cir.) 236 F (2) 871, California, etc., v. Sampsell (9 Cir.) 196 F (2) 252.

Dated: November 24, 1958.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

Duly verified.

[Endorsed]: Filed November 24, 1958, [86] Referee.

[Title of District Court and Cause.]

PETITION FOR REVIEW

Comes now Ralph Meyer and, by way of petition for review of the Referee's Order disapproving Report and Account of Assignee for Benefit of Creditors, copy of which is attached hereto, marked Exhibit "A," and made a part hereof as if at this point set forth verbatim, respectfully represents as follows:

I.

The findings of fact, as made by the Referee, do not properly state the facts, in that they fail to set forth the following, and said findings of fact should be amplified and corrected to reflect the true and complete facts, as follows:

A. To Finding III should be added: "The indebtedness of Vensep, Inc., to the Department of Employment of the State of California and to the Board of Equalization of the State of California was incurred from and in connection with the business of Vensep, Inc., licensed by the Department of Alcoholic Beverage Control of the State of California." [88]

B. To Finding IV should be added: "Ralph Meyer made the payments set forth particularly and specifically herein for services rendered by the said respective payees to the Assignee and in connection with the preservation, care, and preservation of the assets of Vensep, Inc., Assignor."

C. To Finding VI should be added: "No claim was filed with Ralph Meyer, Assignee, either by or on behalf of the employees of Vensep, Inc., Assignor, for wages earned and unpaid to said employees at any time at all."

II.

The Referee erred in the conclusions of law in that:

A. They are contrary to the facts in this case;

B. They are not supported by the evidence;

C. They are contrary to law.

The Department of Alcoholic Beverage Control, as licensing agent of liquor licenses in the State of California, had and has the right to demand of licensees the payment of all taxes due to the State of California as condition precedent to transfer of said license and that the lien of the labor claimants, pursuant to Section 1204 of the Code of Civil Procedure of the State of California, is, in fact and in law, subordinate to the payment to the respective State agencies of the indebtedness owed to them.

III.

Petitioner is aggrieved by the Order appealed from herein in that said Order surcharges Petitioner in the sum of $4,437.40, and that said surcharge is contrary to law in that said sum represents payments made by Petitioner to increase, conserve, and preserve the assets of the estate, and

that said payments were made by Petitioner lawfully, and that said payments were necessary and proper.

Wherefore, Petitioner prays that the Order disapproving [89] Report and Account of Assignee for Benefit of Creditors be reviewed by a Judge of the United States District Court; that the Referee's Order be reversed; that the Report and Account of Assignee for benefit of Creditors be settled and approved, and that the disbursements made by Petitioner as Assignee be allowed; and for such further relief as to the Court seems just.

Dated: November 21, 1958.

/s/ RALPH MEYER,
Petitioner.

/s/ DOROTHY KENDALL,
Attorney for Petitioner.

Duly verified.

[Endorsed]: Filed November 24, 1958, [90] Referee.

[Title of District Court and Cause.]

NOTICE OF FILING CERTIFICATE ON REVIEW OF REFEREE'S ORDER DATED OCTOBER 23, 1958

To: Dorothy Kendall, Esq., 225 So. Oxford Avenue, Los Angeles 4, California, Attorney for Assignee, Petitioner on Review; Pauline Night-

ingale, Conrad Lee Klein, and Joseph Abihider, 405 California State Building, 217 West First Street, Los Angeles 12, California, Attorneys for Division of Labor Law Enforcement, Respondent on Review; Quittner, Stutman & Treister, Attn.: Herman L. Glatt, Esq., 639 So. Spring Street, Los Angeles 12, California, Attorneys for Trustee.

Notice is hereby given that the undersigned Referee in Bankruptcy has this date filed with the Clerk of the Court his Certificate on Review of the Order dated October 23, 1958.

Rule 204(d) of the Court provides that the reviewing party, within ten (10) days after the mailing of the notice of the filing of the certificate on review, shall serve upon the respondent and file with the Clerk in duplicate a memorandum of points and authorities; and that the respondent shall in like manner, serve and file a reply memorandum of points and authorities within five (5) days thereafter.

Dated: December 17, 1958.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed December 17, 1958, [97] U.S.D.C.

[Title of District Court and Cause.]

CERTIFICATE ON REVIEW OF REFEREE'S ORDER DATED OCTOBER 23, 1958

To: Hon. William C. Mathes, United States District Judge.

The Undersigned, Joseph J. Rifkind, a Referee in Bankruptcy of the above-entitled court, does hereby certify as follows:

Statement of Case

The referee made an order on October 23, 1958, surcharging the assignee for the benefit of creditors in the sum of $4,437.40 based on the ground that the assignee depleted the trust estate in his possession by paying certain expenses and tax claims which were subordinate in payment to certain priority wage claims. The objection to the assignee's report and account filed by the trustee in bankruptcy and that filed by the Division of Labor Law Enforcement were heard together by stipulation.

The petition for review was not filed within ten days after the entry of the order as required by Section 39c of the Bankruptcy Act, but was filed on November 24, 1958. No application for an extension was made or granted within the period of ten days after the entry of said order. The assignee on November 24, 1958, filed a petition for extension of time within which to file his petition for review. The application was denied because the time to

review had already expired and also because the referee felt that justification [98] for such extension was not shown even if the referee had jurisdiction to grant the extension. The belatedly filed petition for review is, however, being certified to the district judge because of the decision of In re Robert B. Steinberg (S.D. Cal.) 138 F. Supp. 462.

Summary of Evidence

The matter was heard upon a stipulation of facts entered into in open court, a summary of which is as follows:

The bankrupt, Vensep, Inc., under the names of Your Host and Club Nocturne, was prior to May 29, 1957, engaged in operating a restaurant and cocktail lounge. The bankrupt on May 29, 1957, executed a general assignment for the benefit of its creditors to Ralph Meyer as assignee. The bankrupt was at the time of the making of said assignment insolvent both in the equity as well as the bankruptcy definition of that term under Section 1(19) of the Bankruptcy Act. That on July 17, 1957, within four months of the execution of the assignment, an involuntary petition in bankruptcy was filed against the assignor-debtor who was thereafter adjudicated a bankrupt on August 16, 1957.

That during the pendency of the assignment, the assignee sold the assignor's liquor license for the sum of $5,800.00. That out of the proceeds of sale the assignee paid to the Department of Employment of the State of California the sum of $1,655.08

and to the Board of Equalization of the State of California the sum of $1,746.30. That the Department of Alcoholic Beverage Control of the State of California required payment of said sums as a condition precedent to the transfer of said liquor license to the purchaser.

That during the pendency of the assignment, the assignee paid to himself as assignee's fees the sum of [99] $423.70, to Dorothy Kendall as attorney for the assignee the sum of $250.00, and disbursed for miscellaneous other items of expense incurred during the pendency of the assignment the sum of $362.32, or a total of $1,016.02.

That upon the appointment and qualification of the trustee in bankruptcy, the assignee turned over the balance remaining in his possession of $2,624.43. That on May 29, 1957, when the assignment for the benefit of creditors was executed, the debtor (bankrupt) was indebted to numerous of its employees for wages due for personal services rendered by such employees to the bankrupt, within ninety (90) days immediately prior thereto aggregating $7,662.85. That a Proof of Priority Wage Claim under Section 64a(2) of the Bankruptcy Act has been duly filed by the Division of Labor Law Enforcement on behalf of such employees.

Questions Presented on Review

The referee concluded that all of the claims paid and disbursements made by the assignee were subordinate in priority of payment to the payment of

the wage claims under Section 1204 of the Code of Civil Procedure of the State of California and surcharged the assignee for such improper disbursements in the sum of $4,437.40.

The petitioner on review asserts that the referee erred in that the "Department of Alcoholic Beverage Control, as licensing agent of liquor licenses in the State of California, had and has the right to demand of licensees the payment of all taxes due to the State of California as condition precedent to transfer of said license and that the lien of the labor claimants, pursuant to Section 1204 of the Code of Civil Procedure of the State of California, is, in fact and in law, subordinate to the payment to the respective State agencies of the indebtedness owed to them." [100]

The errors complained of are more particularly set forth in the petition for review transmitted herewith.

Documents Transmitted With Certificate

The following documents are transmitted herewith, to wit:

1. Report and Account of Assignee for Benefit of Creditors dated December 5, 1957, and filed December 9, 1957;

2. Objection to Report and Account of Assignee, filed by trustee in bankruptcy on July 17, 1958, and Order to Show Cause issued pursuant thereto on July 17, 1958;

3. Answer of Assignee to Objection of trustee in bankruptcy filed July 29, 1958;

4. Objection to Report and Account of Assignee filed by Division of Labor Law Enforcement on July 17, 1958, and Order to Show Cause issued pursuant thereto on July 17, 1958;

5. Answer of Assignee to Objection of Division of Labor Law Enforcement filed July 25, 1958;

6. Memorandum of Points and Authorities of Division of Labor Law Enforcement filed July 29, 1958;

7. Memorandum of Points and Authorities of Assignee filed August 19, 1958;

8. Supplementary Memorandum of Points and Authorities of Division of Labor Law Enforcement filed August 29, 1958;

9. Trustee's Memorandum of Points and Authorities filed September 2, 1958;

10. Memorandum Opinion dated September 29, 1958;

11. Letter dated October 14, 1958, received October 15, 1958;

12. Findings of Fact, Conclusions of Law and Order [101] dated October 23, 1958;

13. Letter dated October 16, 1958, received October 17, 1958;

14. Letter dated October 15, 1958, received October 17, 1958;

15. Petition for Extension of Time Within Which to File Petition for Review of Order of Referee filed November 24, 1958, and Order thereon denying same;

16. Petition for Review filed November 24, 1958;

17. Notice of Filing Certificate on Review dated December 17, 1958.

Dated: December 17, 1958.

Respectfully transmitted,

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed December 17, 1958, [102] U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS PETITION FOR REVIEW

To Ralph Meyer and His Counsel, Max Sisenwein:

Notice Is Hereby Given that on January 26, 1959, at the hour of 9:30 a.m. in the courtroom of the Honorable William C. Mathes, United States District Judge, the Trustee in Bankruptcy will move to dismiss the Petition for Review filed herein. Ground for said motion is that the said Petition for Review was not filed within the ten-day period prescribed by Section 39c of the Bankruptcy Act, 11 U.S.C., Section 67c, in that the Order disap-

proving the Assignee's report and account and surcharging him in the sum of $4,437.40 was entered on the 23rd day of October, 1958, and the Petition for Review was not filed until November 24, 1958. Said motion will be based upon the entire record now before the District Judge.

Dated: January 9th, 1959.

QUITTNER, STUTMAN & TREISTER,

By /s/ HERMAN L. GLATT,
Attorneys for Trustee in Bankruptcy.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 12, 1959, [111] U.S.D.C.

United States District Court for the Southern District of California, Central Division

No. 80,333-WM—In Bankruptcy

In the Matter of:

VENSEP, INC., d/b/a YOUR HOST and Also CLUB NOCTURNE,

Bankrupt.

ORDER ON REVIEW OF REFEREE'S ORDER OF OCTOBER 23, 1958

Upon the petition for review filed by Ralph Meyer on November 24, 1958; upon the certificate

of Referee Joseph J. Rifkind filed December 17, 1958; upon the proceedings had before the Referee as shown by his certificate; and it appearing to the Court that:

(1) within four months of bankruptcy petitioner accepted, for the benefit of creditors, an assignment of the then-insolvent debtor's assets, including an on-sale California liquor license;

(2) thereafter and prior to the adjudication of the debtor as a bankrupt, petitioner sold the on-sale liquor license for $5,800;

(3) from the proceeds of the sale petitioner paid to the Department of Employment of the State of California unemployment compensation contributions owed by the then-insolvent debtor amounting [113] to $1,655.08, and also paid to the Board of Equalization of the State of California sales and use taxes owed by the then-insolvent debtor in the sum of $1,746.30;

(4) the Department of Alcoholic Beverage Control of the State of California, pursuant to regulations promulgated by it under § 24049 of the California Business and Professions Code, required payment of said sums as a condition precedent to approval of the transfer of said liquor license to the purchaser;

(5) during the term of the assignment for the benefit of creditors, petitioner also paid to himself as assignee fees amounting to $423.70, and paid to Dorothy Kendall as attorney for the assignee a

fee of $250, and paid $362.32 for miscellaneous expense items—a total of $1,016.12;

(6) at the time the assignment for the benefit of creditors was executed, the then-insolvent debtor was indebted to various of its employees in the sum of $7,662.85 for wages due for personal services rendered within the period of ninety days next preceding said assignment;

(7) following adjudication of the insolvent debtor as a bankrupt, petitioner turned over to the trustee in bankruptcy the assigned assets remaining in his possession in the amount of $2,624.43, without paying any of the wage claims mentioned in (6) above;

(8) petitioner's payment of State sales [114] and use taxes, and of the State unemployment compensation contributions, owing by the then-insolvent debtor, without first paying the wage claims as provided by § 1204 of the California Code of Civil Procedure, was improper and contrary to law in that: (a) § 6756 of the California Revenue and Taxation Code and § 1702 of the California Unemployment Insurance Code expressly subordinate obligations for sales and use taxes and unemployment compensation contributions to obligations for wage claims whenever, as here, § 1204 of the Code of Civil Procedure applies, and (b), § 24049 of the California Business and Professions Code, does not in any way alter the preferences

otherwise established by the statutory provisions just mentioned;

(9) petitioner's payment of $1,016.12 for assignee's fees and expenses, without first paying wage claims as required by § 1204 of the California Code of Civil Procedure, was likewise improper and contrary to law [Division of Labor Law Enforcement v. Stanley Restaurants, 228 F. 2d 420 (9th Cir., 1955)];

(10) the statutory liens of the wage claimants under State law were invalid as against the trustee in bankruptcy [see § 67c(2) of the Bankruptcy Act, 11 U.S.C., § 107c(2); and see 4 Collier on Bankruptcy, § 67.281 [1] at 311, particularly n.5 (14th ed., 1957)], and passed to the trustee to be preserved for the benefit of the bankrupt estate [see last sentence of § 67c of the Bankruptcy Act, 11 U. S. C., § 107c; cf. 4 Collier on Bankruptcy, § 67.281 [2] (14th ed., 1957)], which hence had, as to the assets of the [115] erstwhile insolvent debtor now bankrupt, a claim senior to the claims of the recipients of the disbursements by petitioner listed in (2) and (5) above;

(11) petitioner is accordingly subject to surcharge under § 2a(21) of the Act [see 11 U.S.C., § 11a(21); Hall v. Goggin, 148 F. 2d 774 (9th Cir., 1945); compare: in re Hollywood Premiere, 228 F. 2d 492 (9th Cir., 1955)], unless the assignee-petitioner can show "that disbursements in question were approved, upon notice to creditors and

other parties in interest, by a court of competent jurisdiction prior to the bankruptcy proceeding" [11 U.S.C., § 11a(21); 1 Collier on Bankruptcy, § 2.79 at 353 (14th ed., 1957)];

(12) since the assignee-petitioner makes no claim that the disbursements in question were approved by any court prior to the bankruptcy proceeding, the condition subsequent stated in § 2a(21) of the Act can have no application here [11 U.S.C., 11a (21)]; and

(13) although petitioner failed to file a petition for review within the time prescribed by § 39c of the Act [see 11 U.S.C., 67c], this Court exercising equitable powers may, and under the circumstances here should, entertain the present petition for review [in re Steinberg, 138 F. Supp. 462 (S.D., Cal., 1956)].

It Is Now Ordered that the motion of the trustee in bankruptcy to dismiss the petition for review is hereby denied, and the Referee's order of October 23, 1958, under [116] review is hereby confirmed.

It Is Further Ordered that the Clerk this day serve copies of this order by United States Mail upon

(1) Referee Joseph J. Rifkind;

(2) The attorney for petitioner; and

(3) The attorneys for respondents.

March 27, 1959.

/s/ WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed March 30, 1959, U.S.D.C.

Entered March 31, 1959. [117]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Clerk of the Above-Entitled Court:

Notice Is Hereby Given that Ralph Meyer hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the Order dated March 27, 1959, made by Honorable William C. Mathes, Judge of the United States District Court, reviewing the Order of Honorable Joseph J. Rifkind, Referee in Bankruptcy, dated October 23, 1958.

Dated: April 13, 1959.

MAX SISENWEIN and
DOROTHY KENDALL,

By /s/ MAX SISENWEIN,
Attorneys for Appellant,
Ralph Meyer.

[Endorsed]: Filed April 14, 1959, U.S.D.C. [118]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Irving I. Bass, the Trustee in Bankruptcy herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that portion of the Order on Review of Referee's Order of October 23, 1958, dated March 27, 1959, made by the Honorable William C. Mathes, Judge of the United States District Court, denying the motion of said Trustee in Bankruptcy to dismiss the petition for review filed by Ralph Meyer seeking a review of the order of the Honorable Joseph J. Rifkind, Referee in Bankruptcy, dated October 23, 1958.

Dated: This 17th day of April, 1959.

QUITTNER, STUTMAN & TREISTER,

By /s/ HERMAN L. GLATT,
Attorneys for Irving I. Bass,
Trustee in Bankruptcy.

[Endorsed]: Filed April 21, 1959, U.S.D.C. [125]

[Title of District Court and Cause.]

TRUSTEE'S STATEMENT OF POINT ON APPEAL

Comes Now Irving I. Bass, Trustee in Bankruptcy, Appellee and Cross-Appellant herein, and,

pursuant to Rule 75d of the Federal Rules of Civil Procedure, furnishes the following Statement of Point on Appeal:

The Motion of the Trustee in Bankruptcy to dismiss the Petition for Review filed by Appellant, Ralph Meyer, on November 24, 1958, seeking a review of the Referee's Order of October 23, 1958, Re Objections to Assignee's Report and Account should have been granted on the authority of Section 39c of the Bankruptcy Act, 11 U.S.C., Section 67c, for the reason that said Petition for Review was filed more than ten days after the entry of the said Order of the Referee of October 23, 1958.

Respectfully submitted,

QUITTNER, STUTMAN & TREISTER,

By /s/ HERMAN L. GLATT,

Attorneys for Irving I. Bass, Trustee in Bankruptcy, Appellee and Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 27, 1957, U.S.D.C. [133]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are

listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

A. Names and Addresses of Attorneys.

Petition in Involuntary Bankruptcy, filed 7/17/57.

Order of General Reference, filed 7/17/57.

Adjudication of Bankruptcy, filed 8/21/57.

Report and Account of Assignee for Benefit of Creditors, filed 12/9/57.

Trustee's Petition objecting to Report and Account of Assignee and seeking surcharge against Assignee and Attorney for Assignee and for Orders to Show Cause thereon, filed 7/17/58.

Order to Show Cause re Petition objecting to Assignee's Account and Report and seeking surcharge against Assignee and Attorney for Assignee, filed 7/17/58.

Division of Labor Law Enforcement's Petition re objections to report and account of Assignee for Benefit of Creditors and for Order to Show Cause thereon, filed 7/17/58.

Order to Show Cause re Petition of Division of Labor Law Enforcement objecting to Assignee's Account and Report and seeking surcharge against Assignee, filed 7/17/58.

Answer of Ralph Meyer, Assignee, to Petition re objections to report and account of Assignee for Benefit of Creditors, filed 7/25/58.

Answer of Ralph Meyer, to Petition objecting to

report and account of Assignee and seeking surcharge against Assignee and Attorney for Assignee, filed 7/29/58.

Memorandum of Points and Authorities of Division of Labor Law Enforcement, filed 7/29/58.

Memorandum in support of Assignee's Report and Account and in opposition to objections thereto, filed 8/19/58.

Supplementary Memorandum of Division of Labor Law Enforcement, filed 8/29/58.

Trustee's Memorandum re objections to Assignee's Report and Account and in support of surcharge against Assignee and Attorney for Assignee, filed 9/2/58.

Memorandum Opinion re Objections to Report and Account of Assignee, filed 9/29/58.

Letter, dated 10/14/58, addressed to Hon. Joseph J. Rifkind, Referee in Bankruptcy, received 10/15/58.

Letter, dated 10/16/58, addressed to Hon. Joseph J. Rifkind, Referee in Bankruptcy, received 10/17/58.

Letter, dated 10/15/58, addressed to Hon. Joseph J. Rifkind, Referee in Bankruptcy, received 10/17/58.

Findings of Fact, Conclusions of Law, and Order re Objections to Assignee's Report and Account, filed 10/23/58.

Petition for extension of time within which to file Petition for Review of Order of Referee and denial of same, filed 11/24/58.

Petition for Review, filed 11/24/58.

Notice of filing Certificate on Review of Referee's Order dated 10/23/58, filed 12/17/58.

Certificate on Review of Referee's Order dated October 23, 1958, filed 12/17/58.

Additional Memorandum of Ralph Meyer, Petitioner, in support of his Petition for Review, filed 12/29/58.

Memorandum of Trustee in opposition to Petition for Review, filed 1/5/59.

Trustee's Notice of Motion to Dismiss Petition for Review, filed 1/12/59.

Order on Review of Referee's Order of October 23, 1958, filed 3/30/59, and entered 3/31/59.

Notice of Appeal, filed by Ralph Meyer on 4/14/59.

Designation of Ralph Meyer of portions of the record to be contained in the Record on Appeal, filed 4/14/59.

Affidavit of Service by Mail of Ralph Meyer re Notice of Appeal, filed 4/15/59.

Notice of Appeal, filed by Irving I. Bass, Trustee, on 4/21/59.

Designation of Record on Appeal of Irving I. Bass, Trustee, filed 4/21/59.

Trustee's Statement of Point on Appeal, filed 4/27/59.

Dated: May 4, 1959.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16459. United States Court of Appeals for the Ninth Circuit. Ralph Meyer, Appellant, vs. Irving I. Bass, Trustee in Bankruptcy of the Estate of Vensep, Inc., etc., Bankrupt, and Division of Labor Law Enforcement, Appellees, vs. Irving I. Bass, Trustee in Bankruptcy of the Estate of Vensep, Inc., Bankrupt, Appellant, vs. Ralph Meyer, Appellee. Transcript of Record. Appeals From the United States District Court for the Southern District of California, Central Division.

Filed: May 5, 1959.

Docketed: May 8, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16459

RALPH MEYER, Assignee, etc.,

Appellant,

vs.

IRVING I. BASS, Trustee,

Appellee & Cross-Appellant,

DIVISION OF LABOR LAW ENFORCEMENT,

Appellee.

STATEMENT OF POINTS

Comes now Ralph Meyer, the Appellant and Cross-Appellee herein, and pursuant to Rule 17 (6) of the Rules of this Court, furnishes the following statement of points on appeal:

1. That the regulations promulgated by the Department of Alcoholic Beverage Control of the State of California, pursuant to Section 24049 of the California Business and Professions Code, are valid and enforceable regulations and were and are binding upon the Appellant herein as Assignee for the benefit of creditors of Vensep, Inc., etc.

2. That the Appellant as Assignee was required to and did properly and legally pay to the Department of Employment of the State of California and to the Board of Equalization of the State of Cali-

fornia, the monies due and owing to said Departments by the assignor (now the bankrupt).

3. That the Appellant as Assignee properly and legally paid to himself fees as Assignee and properly expended miscellaneous expenses including attorneys fees, during the course of the administration of said assignment proceedings.

4. That the Referee in Bankruptcy committed error in making its Findings of Fact, Conclusions of Law, and Order dated October 23, 1958, surcharging the Appellant for the payments made to the Department of Employment of the State of California and to the Board of Equalization, which payments were made in accordance with the regulations of the Department of Alcoholic Beverage Control of the State of California, and further surcharging the Appellant for payments made for administration expenses. That said Order is erroneous and contrary to law.

5. That the Order made by the District Court, dated March 27, 1959, wherein it confirmed the Order of the Referee, dated October 23, 1958, is erroneous and contrary to law, in that said Order confirmed the surcharging of Appellant in the same manner as set forth in the Referee's Order, dated October 23, 1958.

6. That the Order made by the District Court, dated March 27, 1959, wherein it denied the motion of the Trustee in Bankruptcy to dismiss the petition

for review of the Appellant is proper and said motion of said Trustee to dismiss the petition for review was properly denied.

Dated: May 8th, 1959.

Respectfully submitted,

MAX SISENWEIN and
DOROTHY KENDALL,

By /s/ MAX SISENWEIN,
Attorneys for Appellant,
Ralph Meyer.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 9, 1959, U.S.C.A.

No. 16,465

United States Court of Appeals

For the Ninth Circuit

UNION PAVING COMPANY, a corporation,
Appellant,

vs.

DOWNER CORPORATION, and RAY H. DOWNER,
Appellees.

APPELLANT'S OPENING BRIEF.

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No. 16,465

United States Court of Appeals
For the Ninth Circuit

UNION PAVING COMPANY, a corporation,
Appellant,

vs.

DOWNER CORPORATION, and RAY H. DOWNER,
Appellees.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

Appellant (hereinafter usually referred to as "Union Paving") is a Nevada corporation authorized to do business in the State of California. Its principal place of business is in the City and County of San Francisco. (Tr. pp. 3-4.) Appellees (hereinafter usually referred to as "Downer"), are a California corporation, whose principal place of business is in the City of Stockton, County of San Joaquin, and Ray H. Downer, a resident of Stockton, California. (Tr. p. 3.) The amount in controversy is in excess of $3,000.00.

On October 23, 1958, the Honorable Sherrill Halbert, United States District Judge, made and filed the Order of the Court directing entry of Final Judgment of Dismissal as to appellant's sixth counter-claim. Said Order

was made pursuant to Rule 54 (b) Federal Rules of Civil Procedure. (Tr. p. 35.)

Within the time prescribed by the Rules and the Order of this Court, appellants took the necessary steps to perfect its appeal.

Jurisdiction is vested in this Court by Section 1291, Title 28, United States Code.

STATEMENT OF THE CASE.

On or about March 11, 1948, the parties hereto entered into a joint venture agreement whereby Downer was to construct, and Union Paving was to finance the construction of, a sanitary sewage system for the Mount Vernon Sanitary District, Bakersfield, California. (Tr. pp. 5-12.) During the progress of this construction, it became apparent that certain sludge pumps necessary to the installation of the treatment plant would not be delivered as ordered. The district engineer gave the joint venturers permission to use used sludge pumps to test the disposal plant. (Tr. pp. 19-20.) The joint venturers were advised that a sewage disposal system was available from the War Assets Administration. (Tr. p. 20.) On or about February 28, 1949, R. H. Downer and Norman Hawkins met with Joseph A. Dowling, president of Union Paving Company, in San Francisco. The surplus sewage system located at Gardner Field, Kern County, California, was discussed. (Tr. p. 21.) Mr. Hawkins stated that he knew that such system could be acquired at a minimum price of $4,000. It was agreed that the joint venture would seek to acquire the entire sewage system, and use what could be used in the Mount Vernon system and sell the re-

mainder. It was agreed that Mr. Downer was to make the bid to the War Assets Administration in his own name. On February 29, 1948, appellant issued its check as follows:

1. No. 26901, Norman L. Hawkins, $500.00. This was in the nature of a finder's fee.

2. No. 26902, War Assets Administration, $4,000.00. This was certified and was the price bid for the sewage system.

3. No. 26903, War Assets Administration, $300.00. This was certified and was for faithful performance of the purchase agreement.

On July 27, 1949, Union Paving Co. was reimbursed for these advances by the joint venture when it issued its check No. 630, payable to Union Paving Co. for $4,800.00. (Tr. p. 21.)

Mr. Downer's bid was successful. The used sludge pump was installed in the Mount Vernon sewage disposal plant for testing purposes and was subsequently replaced when the new pumps were delivered. The joint venturers are presently engaged in extensive litigation concerning this joint venture. On or about December 9, 1953, appellee commenced an action in the United States District Court for the Northern District of California, Northern Division, Numbered 6960. (Tr. pp. 3-12.) In that complaint it was alleged that there had been an account stated winding up the affairs of said joint venture. An additional account alleged a breach of contract on the part of appellant. Appellant answered said complaint with numerous defenses and several counter-claims. The one in issue herein is the so-called Sixth Counter-Claim

whereby appellant seeks damages for an alleged conversion of the assets of the Gardner Field sewage system. (Tr. p. 16.) The District Judge determined that said counter-claim was neither a compulsory counter-claim nor a permissive counter-claim under Rule 13, Federal Rules of Civil Procedure, and ordered said counter-claim dismissed. On October 23, 1958, the District Court directed that final judgment of dismissal be entered regarding said Sixth Counter-Claim on the ground that said matter was not a justiciable issue in said action. The Court determined that there is no just reason for delay and ordered that the judgment of dismissal be a final adjudication of said Sixth Counter-Claim. (Tr. pp. 35-6.)

STATEMENT OF QUESTION PRESENTED.

Reduced to its lowest terms, the question presented to this Court is:

> May a defendant file and maintain a Counter-Claim arising out of the transaction which is the subject matter of the complaint, notwithstanding there is another action pending asserting the same cause of action.

In support of the affirmative of this issue, appellant relies upon the following authorities:

1. Rule 13(a) and (b) Federal Rules of Civil Procedure:

> "(a) COMPULSORY COUNTERCLAIMS
>
> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of

the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

"(b) PERMISSIVE COUNTERCLAIMS

A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

The error complained of is the Judgment of Dismissal found at page 35 of the transcript.

SUMMARY OF ARGUMENT.

Appellant asserts that the answer in the case at bar is unequivocally in the affirmative. Appellant contends:

The District Court erred in that:

1) It refused to hear a Counter-Claim in which it had jurisdiction of the subject matter and of all necessary parties.

2) The transaction involved was an essential portion of the accounting before the Court.

3) There was no other tribunal in which the cause was liable at the time the Order of Dismissal was made.

4) The Counter-Claim in question was either a Compulsory or a Permissive Counter-Claim as those terms are used by the Federal Rules.

From the ensuing argument, it will become apparent to the Court that there is no case on all fours. The cases cited by the learned District Judge do not stand for the proposition for which cited and as will hereinafter be shown are readily distinguishable from the case at bar.

ARGUMENT.

THE DISTRICT COURT ERRED IN REFUSING TO HEAR A COUNTER-CLAIM IN WHICH IT HAD JURISDICTION OF THE SUBJECT MATTER AND OF ALL NECESSARY PARTIES.

a. The District Court had jurisdiction of the subject matter.

Appellant stated a cause of action for conversion of property owned and purchased by the joint venture. The allegations of the Answer (Tr. p. 14) and the Sixth Counter-Claim (Tr. p. 16) are that Downer wrongfully sold and converted a substantial portion of said Gardner Field sewage system. The District Judge, in his Memorandum, concedes that the subject matter of the claim arose out of the transaction which was the subject matter of appellees' claim. Thus, the Court had jurisdiction over the subject matter. This has never been disputed by appellees nor by the holding of the District Judge.

b. All indispensable parties were before the Court.

The gravamen of the cause of action set forth in appellant's Sixth Counter-Claim sounds in tort. Appellant asserts that appellees converted the Gardner Field equipment. That others may also be involved is immaterial since it is clear that an injured party may sue any one or

all joint tort-feasors and that the ones not sued are not indispensable parties.

Pische Mines, etc. v. Fidelity-Philadelphia Trust Co., 206 F. 2d 336 (C.A. 9, 1953), cert. denied;
Ward v. Deavers, 203 F. 2d 72 (App. D.C., 1953);
Ackerly v. Commercial Credit Co., 111 F. Supp. 29 (D.C., S.D. N.Y., 1954).

Conceding for the purpose of argument only that White, the other alleged tort-feasor, is a necessary party, Rule 19(b) Federal Rules of Civil Procedure provides: "The Court in its discretion may proceed in the action without making such persons parties . . . if, though they are subject to the jurisdiction of the Court, their joinder would deprive the Court of jurisdiction of the parties before it."

If we assume that White was a necessary party, in *Sechrist v. Palshook,* 95 F. Supp. 746, the Court was faced with the same problem as was the District Court in this case. One of the defendants, joint tort-feasors, was a citizen of the same state as plaintiff. A motion to dismiss the action was denied. The Court simply dismissed the action as to the resident defendant.

See also

Decorative Cabinet Corp. v. Star-Aid of Ohio, Inc., 10 F.R.D. 266 (S.D., N.Y., 1950);
Rumig v. Ripley Mfg. Co., 86 F. Supp. 506 (E.D., Pa., 1949); and
Cohn v. Columbia Pictures Corp., 9 F.R.D. 204 (S.D., N.Y., 1949).

All to the same effect. In *Smith v. Sperling* (C.A. 9, 1956) 237 F. 2d 317, *cert. granted,* 77 S. Ct. 98 as to the

other issue presented, the District Court had dismissed plaintiff's second cause of action on the ground of "lack of equity". The reasoning behind the District Court's action apparently was that if United States Pictures, Inc. were joined by way of counter-claim jurisdiction would be destroyed and that United States Pictures was an indispensable party. In reversing the District Court on this issue, this Court said: "We hold the trial court should have determined the legal sufficiency of the 'second cause of action' against the Warners before proceeding to a determination of the status of the parties and the necessity of joining United States Pictures, Inc., and thus destroying jurisdiction."

THE COURT SHOULD HAVE PROCEEDED TO ADJUDICATE THE ISSUE AS TO THE PARTIES BEFORE THE COURT.

No legal reason has been advanced to justify the District Court's refusal to hear the matters presented. The Court conceded that it had jurisdiction of the subject matter. The judgment below was not based upon lack of indispensable parties or a holding that joining White would deprive the Court of jurisdiction. The Counter-claim was asserted timely and needed no permission to be filed. (Rule 13 a. and b.; cf Rule 13 e.)

The only reason advanced by the Court was that there was another action pending involving the same subject matter and same parties. Thus, the Court reasoned, "the Court cannot consider the Sixth Counter-claim a compulsory Counter-claim under Rule 13 a." (Citing cases.) (Tr. p. 30.) The matter in the opinion of the District

Judge could not be a permissive Counter-claim because "there is a definite logical relationship between the Mount Vernon Project (subject matter of plaintiff's Complaint) and the Gardner Field matter." (Tr. p. 30.)

The cases relied upon by the District Judge do not support the Judgment of Dismissal. In *Meyercheck v. Givens* (CA 7 1950) 186 F. 2d 85, the Court was presented with an appeal from a judgment entered pursuant to the Mandate of the Court of Appeals in a prior appeal. Appellant made numerous attacks on the judgment. One of the attacks made was that upon remand "The Court erred in refusing to allow the defendant to file a Counter-claim under Rule 13 a. against . . . one of the plaintiffs . . ." (p. 87.) The Answer of the Court of Appeals to this Argument demonstrates the inapplicability of the ruling to the case at bar.

The opinion states:

> "*No pleading in the form of a Counter-claim is shown in the record and it appears none was presented.* All that is shown is a colloquy between Court and Counsel by which the latter expressed the desire to file a counter-claim. *Thus, in the absence of a pleading disclosing the nature of the proposed counter-claim, there is nothing for us to review. More than that, the only matter before the Court was compliance with the mandate and we doubt if defendant was entitled to file a Counter-claim at that stage of the proceeding.* Rule 13 (a) on Compulsory Counter-claim provides 'that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action', and the record discloses that at the time the filing of a counter-claim was proposed, the defendant had pend-

ing in the Municipal Court of Chicago an action for the same grievance." (p. 87.)

Note the reasons given for sustaining the District Court's action are two: (1) No pleading to review and (2) the stage of the proceeding. The *last* sentence quoted does not hold as the learned District Judge asserted, that a pending action removes a claim that is otherwise a compulsory counter-claim for that classification.

The holding simply was that at that stage of the proceeding *no* counter-claim could be asserted.

In *Esquire Inc. v. Varga Enterprises* (C.A. 7. 1950), 185 F. 2d 14, the subject of the counter-claim in question had not matured into a right of action when the pleading was filed. The issue presented was whether the dismissal with prejudice of a counter-claim pleaded at that time was *res judicata* as to a right of action for unfair competition and trade-mark infringement. After stating that the dismissal was *res judicata* not only as to those matters actually pleaded but all which under Rule 13(a) were required to be pleaded the Court stated that the right of action referred to was not barred because (1) the right of action had not matured; hence could not be pleaded as a compulsory counter-claim and (2) although a compulsory counter-claim it was one which expressly need *not* be pleaded because there was another action pending.

Such a holding is a far cry from that apparently asserted by the Court below. There is *no* intimation at all that the fact that there was another action pending prevented the claim from being a compulsory counter-claim. The only holding is that failure to plead the claim will

not make any judgment entered *res judicata.* Rule 13 (a) makes this clear when it states that such a counter-claim "need not be so stated".

As stated above there are no cases on all fours. However, an analysis of Rule 13 and its background will demonstrate that this rule was designed to liberalize counter-claim practice and to prevent multiplicity of actions. The exception stated in Rule 13 (a) is in favor of the pleader —he should be permitted to file the counter-claim or refrain from doing so as he chooses. In 3 Moore's Federal Practice, Paragraph 13.14, Page 38, the author states:

> "A claim which is the subject of a pending action need not be pleaded although it does arise out of the transaction or occurrence that is the subject matter of the opposing party's claim. Thus assume P and A are in an auto wreck and both seriously injured and that A sues P for personal injuries in a state court. Then subsequently P sues A for personal injuries in a federal court. Although A's claim for personal injuries arises out of the transaction or occurrence which is the subject matter of P's claim in the federal court, A need not plead such claim, because his claim is the subject of an action already pending in another court. The next question is: May he do so? *The policy underlying Rule 13 would permit him, if he so desired, since the exception runs in A's favor and hence he should have the option to avail himself of it or not.*" (Emphasis added.)

In a parallel case (though not involving a counter-claim) *Ermentrout v. Commonwealth Oil Co.* (C.A. 5, 1955), 220 F. 2d 527, a majority stockholder had commenced a class action in the State Court in Florida. The instant action was commenced by a minority stockholder and was based

upon diversity of citizenship. The District Court had dismissed the action solely because of the pendency of the State Court proceeding. In reversing this judgment, the Court of Appeals said,

> "The rule is well established that when an action is in personam and involves a question of personal liability only, another action for the same cause in another jurisdiction is not precluded. Kline v. Burke Construction Company, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226, 24 A.L.R. 1077; McClellan v. Carland, 217 U.S. 268, 30 S.Ct. 501, 54 L.Ed. 762; Byrd-Frost, Inc., v. Elder, 5 Cir., 93 F.2d 30, 115 A.L.R. 342. *Therefore the pendency of a state court action in personam is no ground for abatement or stay of a like action in the federal court, although the same issues are being tried and the federal action is subsequent to the state court action. The federal court may not abdicate its authority or duty in favor of the state jurisdiction.* McClellan v. Carland, supra; Kline v. Burke Construction Company, supra; Byrd-Frost, Inc. v. Elder, supra; Aetna Life Insurance Company of Hartford v. Martin, 8 Cir., 108 F.2d 824. 'Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principle of res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case.' Kline v. Burke Construction Company, supra [260 U.S. 226, 43 S.Ct. 81]." (P. 530) (Emphasis added.)

We believe in this case the error of the District Court is made the more manifest because the subject matter of the

counter-claim was inextricably enmeshed with the subejct matter of the accounting before the Court. To this issue we now turn.

THE SO-CALLED GARDNER FIELD MATTER WAS AN ESSENTIAL PORTION OF THE ACCOUNTING BEFORE THE COURT.

The principal matter determined by the Preliminary trial before the District Court was that there had been *no* accounting between the parties as to the Mount Vernon Joint Venture. Thus, the Court, pursuant to the pleadings was required to make such an accounting. The Order provided that the Court would "in due course appoint a special master to render an accounting between the parties to this action." (Tr. p. 33.)

On June 9, 1958, Union Paving after due notice moved the District Court to either require the Special Master to include the Gardner Field matter in the accounting or in the alternative to direct issuance of a final appealable judgment thereon. (Tr. p. 34.) The Court's response was the Order directing entry of final judgment filed October 23, 1958. (Tr. pp. 35-6.)

The District Court prior to making the Order of October 23, 1958 had the following facts to demonstrate that the Gardner Field matter was an essential portion of the accounting ordered by that Court:

1) The reason for entering the Gardner Field transaction was to procure a sludge pump to test the Mount Vernon plant. (Tr. pp. 19-20.)

2) The money used was joint venture money, i.e., Union Paving in its role as financier advanced its

own funds which were in turn reimbursed by joint venture funds. (Tr. p. 21.)

3) According to Downer, the $2,000.00 obtained from White was used to pay a joint venture payroll. (Tr. p. 22.) This was reflected on the joint venture books until altered allegedly at Joseph A. Dowling's request.

4) J. T. Masters who had a contract with Downer to construct the Treatment Plant (Tr. p. 24) also was to dismantle the Gardner Field Plant and remove the property to Bakersfield (Tr. pp. 24-5.)

Indeed, in its Order the District Court stated that in its opinion "the 'Gardner Field' matter would, . . . arise out of the same transaction or occurrence which forms the subject matter of the main action . . ." (Tr. p. 30.) It is Hornbook law that all matters arising out of the same transaction should be settled in the same action if possible. It is difficult to see how the Special Master could take an accounting between the parties without inquiring into something that was an essential part of the joint venture. This, however, the Court ordered him to do. In this the Court erred.

THERE WAS NO OTHER TRIBUNAL IN WHICH THE CAUSE WAS TRIABLE AT THE TIME THE DISTRICT COURT DISMISSED APPELLANTS' SIXTH COUNTER-CLAIM.

Appellant in this case had put all of his eggs in one basket. Notwithstanding that the Gardner Field matter had been pleaded in the State Court proceeding, appellant had by its action elected to try this matter together

with the Mount Vernon matter in the Federal Courts. Therefore, no action had been taken in the State Court to bring that matter to trial.

More than five (5) years had elapsed from the filing of the Cross-Complaint in the State Court at the time of the hearing before the District Court. This fact was called to the attention of the District Judge and is commented on. (Tr. p. 31.)

The fact of the matter is, as the learned District Judge was aware, Downer had an absolute right to dismiss the State Court proceeding pursuant to Section 583 of the California Code of Civil Procedure. Thus, as a practical matter there was *no* other tribunal in which this matter could have been tried.

THE SIXTH COUNTER-CLAIM WAS EITHER A COMPULSORY OR A PERMISSIVE COUNTER-CLAIM. IN EITHER EVENT IT HAVING BEEN TIMELY ASSERTED, IT WAS AN ERROR TO DISMISS THE CLAIM.

The District Court held that Union Paving's Sixth Counter-claim was neither compulsory nor permissive. Hence, reasoned the District Court it was improperly asserted as a Counter-claim. Such holding, however, completely ignores the language and the history of Rule 13, and is at complete variance with both.

Rule 13 provides in part,

"(a) COMPULSORY COUNTERCLAIMS

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject mat-

ter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

"(b) PERMISSIVE COUNTERCLAIMS

A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

A counter-claim is, of course, a claim asserted against an opposing party as distinguished from a co-party. There can be no doubt but what appellant's Sixth Counter-claim is a counter-claim as so defined.

Note that Rule 13 divides counter-claims into only two classifications, i.e. Compulsory and Permissive. Since there are only two classes, a counter-claim must be one or the other.

It is appellant's contention that the Sixth Counter-claim is a compulsory counter-claim. The factual predicate for so holding was found by the District Court. (Tr. p. 30.) Further, the discussion at pp. 13-14 supra of this brief demonstrates that the Gardner Field transaction arose from the transaction that is the subject matter of Downer's claim.

In *United Artists Corp. v. Masterpiece Productions* (C.A. 2, 1955), 221 F. 2d 213, plaintiff sued for copyright infringement and unfair trade practices. Defendant's counter-claim brought in third parties. Defendant's claim had been held permissive by the District Court and the

counter-claim dismissed because jurisdiction was thus destroyed. *Held:* Compulsory.

> "A counter-claim is compulsory under F.R. 13 (a) 'if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.' *In practice this criterion has been broadly interpreted to require not an absolute identity of factual background for the two claims, but only a logical relationship between them* . . . (citation)." " 'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." (p. 216.) (Emphasis added.)

Nothing in F.R. 13 (a) compels a different result. True, that rule excludes from its definition of counter-claim those which require for their adjudication "the presence of parties of whom the Court cannot acquire jurisdiction." This restriction should be limited to cases of inability to obtain personal jurisdiction over the additional parties. (p. 217.)

See also the same case in the Court below where the District Judge said,

> "The crucial test of compulsoriness is that of logical relationship between the claims, tempered by the eye to flexibility, by a realization that the law's logic is but an inchoate empiricism, and by the desire to avoid multiplicity of suits." (15 F.R.D. 395.)

Rule 13 (a) states two criteria for a compulsory counter-claim (1) it must arise out of the transaction or occurrence which is the subject matter of the opposing party's claim *and* (2) it does not require the presence of

third parties of whom the Court cannot acquire jurisdiction. The exception that such a claim need not be pleaded if it is the subject of another action pending is no part of the definition. This language simply gives the pleader the option to file or not to file as the case may be. Since the option belongs to the pleader he can avail himself of it or not as he chooses. It cannot be the law that such a counter-claim can be dismissed simply because of another action pending. Indeed, it is a matter of discretion, as to whether the Federal Court should even stay its proceedings pending determination of the other action. *(Stevenson v. Erie R. Co.* (S.D. N.Y. 1948) 80 F.S. 393.)

In the *Stevenson* case, *supra,* the defendant had made a motion for judgment of dismissal on the ground of another action pending. This motion was denied but the Court, in exercise of its discretion, stayed its proceedings pending determination of the other case.

Even if this be held a permissive counter-claim under 13 (b), there was no basis upon which to base the judgment of dismissal. The Court had jurisdiction of all necessary parties and of the subject matter of the action.

In *American Car & Foundry Inv. Corp. v. Chandler-Graves Co.* (E.D. Mich. S.D. 1941) 2 F.R.D. 85, plaintiff sued to quiet title to certain letters patent and for incidental injunctive relief. Defendants counter-claimed for treble damages under the Clayton Act and brought in additional parties. The latter appeared specially and moved to quash return of service. Plaintiff moved to dismiss the counter-claim. Jurisdiction was based upon diversity of citizenship. In refusing to quash or to dismiss the District Judge stated the purpose of Rule 13 as follows:

"This rule was enacted for the purpose of dispensing with needless independent actions when existing causes of action might be brought as permissive Counter-claim and particularly for counter-claims such as the one here involved, jurisdiction of the subject matter of which is clearly vested in the United States Courts." (p. 87.) (Emphasis added.)

Historically, Rule 13 is an outgrowth of Equity Rule 30. It was designed to liberalize and broaden counter-claim practice in that it did away with the waiver of a jury trial which resulted from the filing of a legal counter-claim in an equitable action, it made possible the filing of counter-claims in actions at law and permitted any pleader to file a counter-claim as a part of his first responsive pleading. In short, it removed all restrictions upon the filing and maintenance of counter-claims.

"Under Equity Rule 30, there was a holding that the court, could in its discretion, deny leave to file a permissive counter-claim. This power is expressly provided for, but also clearly limited by present Rule 13 to two situations: (1) Where the pleader's counter-claim matures or was acquired after serving his pleading, and (2) where the pleader has failed to set up a counter-claim through inadvertence or excusable neglect and wishes to set up the counter-claim by amendment. *Except in these two cases, leave of Court is not the prerequisite to the pleading of a permissive counter-claim, although the Court may order separate trials . . .*" (3 Moore's Federal Practice p. 3 Rule 13.) (Emphasis added.)

Finally as is stated in Moore's Federal Practice.

"Subdivision (a), which is compulsory, compels a party to plead any claim with certain exceptions, which he has against an opposing party, 'if it arises

out of the transaction or occurrence that is the subject matter of the opposing party's claim'. Subdivision (b), which is permissive, complements Subdivision (a) and allows such a party to present any action claim or claims that he may have against the opposing party or parties. *Thus, all restrictions upon the right to plead counter-claims have been removed.*" (Emphasis added.)

CONCLUSION.

Union Paving invoked the jurisdiction of the District Court in a matter in which the Court had jurisdiction of the subject matter and of all indispensable and necessary parties. The District Court abdicated that jurisdiction without legal reason. This was error. As this Court stated in *Romero v. Wheatley* (C.A. 9, 1955), 226 F. 2d 399, at 401:

> "When a Federal Court is properly appealed to in a case over which it has by law jurisdiction. . . . The right of a party . . . to choose a Federal Court, where there is a choice, cannot be properly denied."

Wherefore, appellant respectfully submits that the judgment of the District Court be reversed and that Court be directed to hear appellant's Sixth Counter-claim.

Dated, San Francisco, California,
August 5, 1959.

Respectfully submitted,
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KENNETH S. CAREY,
Attorneys for Appellant.

EVERETT S. LAYMAN, JR.,
ARTHUR J. LEMPERT,
Of Counsel.

No. 16,465

United States Court of Appeals

For the Ninth Circuit

UNION PAVING COMPANY, a corporation,	*Appellant,*
vs.	
DOWNER CORPORATION, and RAY H. DOWNER,	*Appellees.*

BRIEF OF APPELLEES.

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No. 16,465

United States Court of Appeals

For the Ninth Circuit

UNION PAVING COMPANY,
a corporation,
Appellant,

vs.

DOWNER CORPORATION, and RAY H. DOWNER,
Appellees.

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

Appellees do not believe that appellant's statement of the case is sufficient to give this Court a true picture of the basis upon which the District Court dismissed Appellant's Sixth Counterclaim, and for that reason call this Court's attention to the following:

Inherent in the District Court's order of dismissal are findings of fact by the District Court that:

1. Appellant's Sixth Counterclaim arises out of the transaction that is the subject matter of plaintiff's complaint;

2. Appellant's Sixth Counterclaim does require for its adjudication the presence of third parties of whom the Court can not acquire jurisdiction;

3. At the time this action was commenced, Appellant's Sixth Counterclaim was the subject of another pending action.

Appellees believe that this Court in determining this appeal will assume that these findings of the District Court are adequately supported by the pleadings and papers on file herein; but lest there should be any doubt on that matter, appellees call this Court's attention to the following documents on file in this case, which documents appellees will request the lower Court to send up at the hearing of this appeal.

The complaint in this case was filed in the District Court on October 6, 1953. At that time there was another action pending which had been commenced on January 4, 1952. On or about November 6, 1953, appellant in this action filed in this proceeding a motion to stay this proceeding pending a final decision of the State Court action, and in connection with that motion the then attorney for the appellant filed an affidavit in support of that motion for a stay of proceeding, and said attorney's affidavit, among other things, states as follows:

> "5. On January 4, 1952, one R. E. White filed in the Municipal Court of the Bakersfield Judicial District, County of Kern, State of California, a complaint naming Plaintiffs herein, R. H. Downer and Downer Corporation, J. A. Dowling, and Defendant herein, Union Paving Company, as defendants in said Municipal Court action. Summons was served in said action upon all of the said defendants; and they have all filed numerous responsive pleadings and cross-complaints therein

as the attached certified record will show. Subsequently, the said action was transferred on motion for change of venue to the Municipal Court of the City and County of San Francisco, State of California; and from said San Francisco Municipal Court to the Superior Court of the State of California in and for the City and County of San Francisco, where said action is now lodged and numbered 416,818 and pending.

6. The complaint of said R. E. White in said state action is for specific performance of a certain alleged contract with plaintiffs herein R. H. Downer and Downer Corporation; and the second cause of action of said complaint is to quiet title to certain sewage disposal equipment to which defendant herein Union Paving Company is alleged to claim an interest. Plaintiffs herein filed an answer and cross-complaint in said state action on February 28, 1952; and on April 4, 1952, defendant herein Union Paving Company filed its answer and cross-complaint in said state action. It is said cross-complaint of the Union Paving Company filed April 4, 1952 in said state action which directly puts in issue the identical facts and issues and involves the identical parties as are involved in this federal action. For example, see the certified copy of said cross-complaint contained in Exhibit 'B' attached to this motion and note that the *same* written Mount Vernon Joint Venture Agreement attached to said cross-complaint as Exhibit 'C' as is attached to plaintiff's complaint herein as Exhibit 'A'.

7. The first cause of action of said cross-complaint deals specifically with the property to which the said state court plaintiff, R. E. White,

sought title. Union Paving Company's said first cause of action alleged the formation of a joint venture under the terms of said Mount Vernon Joint Venture Agreement and alleged that the sewage disposal plant in question had been paid for by and was the property of the Mount Vernon Joint Venture and further alleged that the said R. E. White and R. H. Downer and Downer Corporation had sold and converted the said sewage dispoal property knowing the rights of Union Paving Company as a joint venturer and had failed to account to Union Paving Company for the profits from said sale and that an accounting in respect of said joint venture and in respect of the dealings of the parties was necessary. Said first cause of action likewise alleged a violation of the said joint venture agreement in that Downer Corporation and Downer had refused to bear certain costs and had erroneously charged certain items against said Mount Vernon Joint Venture, all in violation of the terms of the agreement. Thus this cross-complaint of Union Paving Company, by its first cause of action, specifically sought an accounting under the terms of said written Mount Vernon Joint Venture Agreement and alleged that no such accounting had ever been had. The first cause of action also sought $62,000.00 damages against Downer and Downer Corporation by reason of their breach of the Mount Vernon Joint Venture Agreement. The sixth cause of action sought declaratory relief, seeking an adjudication of the rights of Downer, Downer Corporation, and Union Paving Company under said Mount Vernon Joint Venture Agreement. Therefore, as can be seen, the original cross-complaint in said state action, filed

over a year and a half ago, involved the identical parties and identical issues concerning the Mount Vernon Joint Venture Agreement as plaintiff seeks to litigate here. Moreover, the said cross-complaint alleged that no accounting had ever been had."

* * *

"13. It is the purpose of Union Paving Company to press to a final conclusion the litigation now pending in the state court as speedily as can be done, and, therefore, by virtue of the pendency of said state action as above set out, proceedings in this court should be stayed until the final determination of the said suit now pending in the San Francisco Superior Court."

It will thus be seen that, according to appellant's attorney, as set forth in said affidavit, R. E. White filed an action as plaintiff in the State Court, seeking to quiet title to the Gardner Field personal property; that Union Paving Company claimed to be a joint venturer with respect to said personal property and that R. E. White, R. H. Downer, and Downer Corporation had sold and converted the property knowing the rights of Union Paving Company as a joint venturer and had failed to account to Union Paving Company for the proceeds from said sale. Since it is alleged that R. E. White was a joint venturer with respect to the Gardner Field property, along with Union Paving Company, J. A. Dowling, Downer Corporation and R. H. Downer, all of said parties were indispensable to a proper determination of that matter.

Parenthetically, it should be observed that the State Court appointed a receiver, who disposed of all of the remaining personal property from Gardner Field, and that fund was subject to the disposition of the State Court and all of the parties were indispensable in order to determine to whom the fund belonged.

Actually, the Gardner Field transaction is very, very remotely connected with the subject matter of the complaint, and the only connection it has is that the funds to acquire the Gardner Field assets were first advanced by Union Paving Company and then by the joint venture of Downer Corporation and Union Paving Company, and the main purpose of acquiring Gardner Field surplus assets was to use a big sludge pump that was a part of Gardner Field for the purpose of testing out the Mount Vernon Sanitary District installation.

STATEMENT OF QUESTION PRESENTED.

Appellees believe that the true question presented to this Court is:

> May a defendant file and maintain a counter-claim arising out of the transaction which is the subject matter of the complaint, where such counter-claim does require for its adjudication the presence of third parties of whom the Court can not acquire jurisdiction and where at the time of the commencement of this action such counter-claim was the subject of another pending action.

SUMMARY OF APPELLEES' ARGUMENT.

1. Rules 13(a) and 13(b) of the Rules of Civil Procedure, by their plain terms, made mandatory the dismissal of Appellant's Sixth Counterclaim by the District Court.

2. In any event, the District Court had the power and the discretion to dismiss Appellant's Sixth Counterclaim.

ARGUMENT.

Appellant argues that all indispensable parties were before the Court, but that was a matter for the District Court to decide, and, as heretofore stated, R. E. White was a joint venturer with Union Paving Company, J. A. Dowling, Downer Corporation, and Ray Downer, and his rights could not be determined without his presence as a party to the proceeding.

In the case of

Pische Mines, etc. v. Fidelity-Philadelphia Trust Co., 206 F. 2d 336 (C.A. 9, 1953),

cited by appellant, this Court held that the counterclaim of Pische was not subject to a *mandatory* dismissal (italicizing ours) because it was supported by an independent ground of federal jurisdiction. Also, the debenture holders' committee was not an indispensable party to the action on the counterclaim. It is interesting to note that in the first appeal of the *Pische* case, 202 F. 2d 944, this Court held that a dismissal of the action was imperative because of the absence of indispensable parties, and that case is authority directly in point in support of the order of dismissal made by the District Court.

In:

Ward v. Deavers, 203 F. 2d 72 (App. D.C., 1953)

cited by appellant, the Appellate Court held that the trial Court should have considered whether relief other than rescission should not be granted against parties actually before the Court. In the case at bar, the District Court has already determined that White is an absent party whose presence is indispensable and has, therefore, at least impliedly, found as a fact that:

(a) White is interested in the controversy;

(b) His interest is not distinct or severable;

(c) The Court cannot render justice between the parties before it in the absence of White;

(d) A decree made in White's absence would injuriously affect his interest;

(e) A final determination of the controversy in White's absence cannot be made with equity and good conscience. Therefore, the District Court correctly followed the rule laid down by this Court in

State of Washington v. U. S. (9 Cir.), 87 F. 2d 421, 427-428,

and

Pische Mines, etc. v. Fidelity-Philadelphia Trust Co., 202 F. 2d 944 at 947.

In the case of:

Ackerly v. Commercial Credit Co., 111 F. Supp. 92 (not p. 29 as cited by appellant)

cited by appellant, which was a wrongful death case, the Court merely points out that plaintiff could elect

to proceed against one or several joint tort-feasors and could dismiss as against one of said tort-feasors, provided such tort-feasor was not an indispensable party.

The case of

Sechrist v. Palshook, 95 F. Supp. 746,

cited by appellant, also involved joint tort-feasors in a wrongful death case. The Court held the liability of defendants would be joint and several and plaintiff could dismiss against one of the defendants as it was not an indispensable party.

The cases of:

Decorative Cabinet Corp. v. Star-Aid of Ohio, Inc., 10 F.R.D. 266 (S.D., N.Y., 1950);

Rumig v. Ripley Mfg. Co., 86 F. Supp. 506 (E.D., Pa., 1949)

and

Cohn v. Columbia Pictures Corp., 9 F.R.D. 204 (S.D., N.Y., 1949),

cited by appellant, all hold to the same effect as the *Sechrist* case, supra.

The case of:

Smith v. Sperling (C.A. 9, 1956), 237 F. 2d 317,

cited by appellant, is not in point.

As to appellant's argument that the District Court should have proceeded to adjudicate the issue as to the parties before the Court, appellees have already stated that inherent in the Court's decision is a finding that White was an indispensable party to a de-

termination of the Sixth Counterclaim. This is not a joint and several tort-feasor case, and appellant's argument is based upon the premise that it is, and for that reason its argument and authorities are not in point.

Appellant attacks the cases cited by the District Court in its memorandum and order, but it is well settled that this Court will affirm the order of dismissal if the order was properly made upon any ground whatever and whether or not that ground was stated by the District Court. Appellees believe that the cases cited by the District Court are in point.

See:

Worcester Felt Pad Corp. v. Tucson Airport Authority, 233 F. 2d 44 Ninth Circuit.

Union Paving Company is a Nevada Corporation. All of the other parties mentioned are citizens of California.

1. Appellant's Sixth Counterclaim is not a compulsory counterclaim under Rule 13(a) because it requires the presence of a third party of whom this Court can not acquire jurisdiction.

2. It was the subject of another pending action and it is not a permissive counterclaim under Rule 13(b) because it would be a compulsory counterclaim under 13(a) but for the exceptions noted, and the Court can not acquire the presence of White under rule 13(h) and, in any event, it could not be permitted as a permissive counterclaim for the same reasons it can not be permitted as a compulsory counterclaim.

In:

Smith v. Sperling, 117 F. Supp. 781

the Court held that diversity of citizenship exists only when all parties on one side of the controversy are citizens of different states from all parties on the other side. Since White is an indispensable party and his citizenship is the same as the plaintiffs, the Court has no jurisdiction because, as this case holds, "jurisdiction is the threshold issue in every case brought in Federal District Court and every Court is bound to determine such issue for itself even when not otherwise suggested."

The case of

Photometric Products v. Radtke, 17 F.R.D. 103, U.S. Dist. Ct. N.Y., 1954,

holds that if an indispensable party is absent from an action, the Court is obliged to dismiss the action entirely. That case likewise holds that the test of whether parties are indispensable or not is one of substance, i.e., whether plaintiff can obtain relief which will later leave open to absent parties the effective assertion of their rights and whether a party's rights can be protected or not is dependent upon facts of each case. That case likewise holds that in determining whether party is merely necessary or indispensable, the Federal Court must determine (1) whether interest of absent party is distinct and severable; (2) whether in absence of such party, Court can render justice between parties before it; (3) whether decree in absence of such party will have no injurious effect on interest of such absent party; (4) whether

final determination, in absence of such party, will be consistent with equity and good conscience; and if any of such questions is answered in the negative, then absent party is indispensable.

The case of

Peninsular Iron Co. v. Stone, 121 U.S. 631,

holds that unless all parties on one side of the controversy have different state citizenship from all parties on other side, diversity does not exist and Court has no jurisdiction.

The case of

Inter State Nat'l Bank of Kansas City v. Luther, 221 F. 2d 389 (C.C.A. 10th),

holds that compulsory counterclaim being ancillary to claim derives its jurisdiction from same source, whereas permissive counterclaim must rest on independent grounds of jurisdiction. (Certiorari denied.)

In the case of

Johnson v. Middleton, 175 F. 2d 535 at 537 (C.C.A. 7th),

the Court states:

> "If Kelley is an indispensable party to this action the Federal Court has no jurisdiction over the action without him."
>
> * * *
>
> "It seems clear that if his inclusion is essential to confer jurisdiction over the proceeding, then when jurisdiction depends upon diversity of citizenship, if his citizenship is the same as that of *one* of the adverse parties his inclusion in the proceeding must prevent jurisdiction from vest-

ing by extinguishing the requisite diversity." (Emphasis ours.)

The case of

Telegraph Delivery Service v. Florists Tel. Service, 12 F.R.D. 342 (U.S.D.C. N.Y.),

is in point with the instant case. In that case the Court held that where a permissive counterclaim was not directly solely against plaintiff but against persons whom defendant sought to add as parties and there was diversity of citizenship between plaintiff, a citizen of California, and defendant, a citizen of New York, but prospective parties defendant were citizens of California, counterclaim would not be permitted since if they were added as parties defendant diversity of citizenship would no longer exist and Court would be deprived of jurisdiction over counterclaim.

In

Johnson v. Middleton, supra,

the United States Court of Appeals for the Seventh Circuit held, at page 537, that "of course, all persons having conflicting claims to a particular fund are indispensable parties to its disposition." (Citing cases.)

The case of

Ward v. Deavers, 203 F. 2d 72 at 75

holds that: "If this were a suit for rescission the suit would not lie in the absence of Deavers." "There is a general rule that where rights arise from a contract all parties to it must be joined." "He

(Deavers) was an indispensable party because a final decree rescinding the agreement could hardly be made without 'affecting' his interest."

Even where the Court has jurisdiction to entertain a permissive counterclaim, it is entirely within the discretion of the Court as to whether the Court desires to entertain such permissive counterclaim and where, in a case like this, all the parties to the counterclaim are not before the Court, we submit that the Court should exercise its discretion not to entertain such permissive counterclaim.

In

Edmonston v. Sisk, 156 F. 2d 300, (C.C.A. 10th)

the Court states:

> "A Federal Court should not proceed to litigate the same cause of action pending in a state court, where controversy between the parties to Federal suit can better be settled in state court proceeding wherein all necessary parties have been joined and are amenable to state process."

The case of

Ackerly v. Commercial Credit Co., supra cited by appellant, holds that the Court *may* retain jurisdiction in a diversity of citizenship action by dismissing a party *who is not indispensable* but *cannot* retain jurisdiction if joining an indispensable party would not give the necessary diversity. The Court in that case defines an indispensable party (at page 94) "as one having such an interest in the controversy that a final decree cannot be made without *either* affecting

his interest or leaving the controversy in such a condition that a final determination may be wholly inconsistent with equity and good conscience."

Appellant argues that the so-called "Gardner Field" matter was an essential portion of the accounting before the Court, but, as heretofore pointed out, the connection between the Gardner Field transaction, which was a joint venture between R. E. White, Ray Downer, Union Paving Co., J. A. Dowling, and Downer Corporation, and the Mount Vernon Joint Venture, which was a joint venture between Union Paving Company and Downer Corporation, was exceedingly remote. Mount Vernon Joint Venture was a written joint venture whose purpose was to install a huge treatment plant and sewer lines in the Mount Vernon Sanitary District near Bakersfield, California, and the Gardner Field Joint Venture was the purchase by White, et al., of Government surplus, which included a sump pump that could be used in testing the Mount Vernon project, as the new pump ordered for the Mount Vernon project had not arrived, and since White had full control over the sale of the surplus property and was one of the joint venturers in the Gardner Field matter but not a joint venturer in the Mountain Vernon matter, it would be only confusion upon confusion to try this Sixth Counterclaim with the other Mount Vernon Joint Venutre accounting matter.

Appellant argues that there was no other tribunal in which the cause was triable at the time the District Court dismissed Appellant's Sixth Counterclaim. The

memorandum and order dismissing Appellant's Sixth Counterclaim was dated January 9, 1958, and filed January 9, 1958. At that time, the State Court action was still pending. On October 23, 1958, the District Court made an order during a final judgment of dismissal of Appellant's Sixth Counterclaim at the request of appellant so that appellant could appeal from that order; but, as stated, the actual order of dismissal of the District Court was made and filed on January 9, 1958. As stated by Henry C. Clausen, the then attorney for appellant, in his affidavit filed in the District Court on or about November 9, 1953, that State Court action was ready for trial and, to quote Mr. Clausen:

> "13. It is the purpose of Union Paving Company to press to a final conclusion the litigation now pending in the state court as speedily as can be done, and, therefore, by virtue of the pendency of said state action as above set out, proceedings in this court should be stayed until the final determination of the said suit now pending in the San Francisco Superior Court."

Although appellant, through its attorney, represented to the District Court that it intended to try the State Court action immediately, it elected not to do so and did nothing in that action until long after the five-year period had run, and that action was subsequently dismissed by the Court for lack of prosecution. But, as the District Court said in its memorandum and order:

> "Concededly, defendant is left in a peculiar position with respect to its sixth counterclaim, but its

opportunity to assert the claim, contrary to its contentions, is not subject to the whims and caprice of the plaintiffs herein and White. Sans some dereliction on the part of the defendant, its cross-complaint in that action, seeking affirmative relief as it does, will not be affected merely because the action filed by White in the State Court against defendant and plaintiffs may be subject to dismissal (under the provisions of §583 of the California Code of Civil Procedure) for having been pending for more than five years. If the defendant is faced with any difficulty in connection with this cross-complaint, it will arise from its own dereliction in not bringing to issue and trial said cross-complaint within the five year period following the filing of the cross-complaint (See: *Tomales Bay Etc. Corp. v. Superior Court,* 35 Cal. 2d 389, 394, 395)." (Emphasis the Court's.)

CONCLUSION.

Appellees respectfully submit that the judgment of the District Court in dismissing Appellant's Sixth Counterclaim was correct and should be sustained.

Dated, Stockton, California,
September 3, 1959.

FORREST E. MACOMBER,
GORDON J. AULIK,
Attorneys for Appellees.

No. 16,465

United States Court of Appeals

For the Ninth Circuit

UNION PAVING COMPANY, a corporation,
Appellant,

vs.

DOWNER CORPORATION, and RAY H. DOWNER,
Appellees.

APPELLANT'S REPLY BRIEF.

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No. 16,465

United States Court of Appeals
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UNION PAVING COMPANY, a corporation,
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Appellees.

APPELLANT'S REPLY BRIEF.

This case presents the unusual picture of appellees' disagreeing with the District Judge as to the proper basis for the latter's order under appeal herein and seeking to sustain that order on completely divergent grounds. The learned District Judge ruled that appellant's Sixth Counterclaim was not justiciable because it is neither a compulsory nor permissive counterclaim. It is not compulsory because there was another action pending. It is not permissive because it would be a compulsory counterclaim but for the other pending action. Appellees apparently do *not* agree with this analysis of the problem for they do not present any substantial argument to support it and frankly state to this Court that the District Court should be sustained if there is any valid basis for the order. Appellees argue that the counterclaim is not

justiciable because its adjudication would require the presence of a third party over whom the District Court could not acquire jurisdiction. The following together with appellant's opening brief will show that neither position is tenable.

SUMMARY OF ARGUMENT.

I. Appellees' statement of the case is incorrect in that it assumes facts not in the record.

II. R. E. White is not an indispensable party. Further, even if he is indispensable there is nothing in the record to indicate that the District Court could not acquire jurisdiction over him.

III. Cases cited by appellees are not in point.

I. APPELLEES' STATEMENT OF THE CASE IS INCORRECT.

Appellees, in an abortive attempt to support the District Court's order, assert that there are certain facts *inherent* in the District Judge's ruling. This assertion is *not* supported by the record. In the first place, the record contains the learned District Judge's memorandum opinion in which he sets forth fully and explicitly the basis for the order of dismissal. It is true that the Sixth Counterclaim arises out of the transaction that is the subject matter of appellees' claim; it is true that at the time the action was commenced the counterclaim was the subject to another pending action. These facts are *not inherent* in the District Judge's reasoning, they are explicit and are the only bases for the order of dismissal.

It is *not* inherent in the District Judge's order that the Sixth Counterclaim requires the presence of third parties of whom the court could not acquire jurisdiction. First, the District Judge was explicit as to the reasons for his order. If the order had been based upon such a fact as asserted by appellees, that fact would have been commented on by the District Judge either in his memorandum or in the order itself. The absence of *any* comment on the asserted fact shows that the District Judge *did not* so find and such a finding is not inherent in his order as asserted by appellees. Second, and by far more important, there is simply *no* evidence in the record to support such a fact.

The District Judge in his memorandum opinion gives an exhaustive analysis of his view of the problem. That analysis is set forth in full on pages 28 to 31 of the transcript of record. At no place in that memorandum is there any hint that the court deemed that it could not acquire jurisdiction over White. To the contrary, the learned District Judge rules that the Sixth Counterclaim was not compulsory because "at the time the action was commenced the claim was the *subject of another action pending*" (pp. 29-30, emphasis added); it was not permissive because it "would, in the opinion of the court, arise out of the same transaction which forms the subject matter of the main action. . . ." (p. 30). Further, the learned District Judge expressly stated that the Sixth Counterclaim "could qualify as a compulsory counterclaim but for the fact that it is presently asserted in a pending State Court action." (p. 31). Thus, does the opinion completely negate appellees' assertion.

There is good reason for the failure of the District Judge to base his ruling upon an inability to acquire jurisdiction over White. That reason is that the evidence simply does not support such a fact. When Rule 13(a) speaks of a person over whom the court cannot acquire jurisdiction, it does not mean jurisdiction in the sense of diversity or presence of a federal question but *personal jurisdiction.*

In *United Artists Corporation v. Masterpiece Production* (C.A. 2 1955), 221 F. 2d 213, a counterclaim was filed joining a citizen of the same state as defendant Masterpiece. The District Judge had dismissed the counterclaim as permissive and not supported by independent federal jurisdiction. The court held the counterclaim to be compulsory and discussing the very argument raised by appellees said:

> "Jurisdiction over compulsory counterclaims is ancillary to the original jurisdiction of the district court. *Moore v. New York Cotton Exchange,* supra, 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750; *Hartley Pen Co. v. Lindy Pen Co.,* D.C.S.D. Cal., 16 F.R.D. 141; *Lewis v. United Air Lines Transport Corp.,* D.C. Conn., 29 F. Supp. 112; and see Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L.J. 393, 418; Note, the Ancillary Concept and the Federal Rules, 64 Harv. L. Rev. 968; Dobie & Ladd, Cases and Materials on Federal Jurisdiction and Procedure 291-301 (2d Ed. 1950); Hart & Wechsler, The Federal Courts and the Federal System 942, 943 (1953). That means that, at least as to the original parties, no independent jurisdictional basis for the counterclaim need be shown. The issue now before us is whether this same principle should carry over

to cover third parties joined to the counterclaim. This involves an examination of F.R. 13(h).

F.R. 13(h) provides: 'When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or crossclaim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.' While a few district courts have limited this provision to indispensable parties, see *Kuhn v. Yellow Transit Freight Lines,* D.C.E.D. Mo., 12 F.R.D. 252; *Edwards v. Rogers,* D.C. E.D.S.C., 120 F. Supp. 499, the majority view, which we believe to be the better one, has been that joinder of all necessary parties is authorized. *Carter Oil Co. v. Wood,* D.C.E.D. Ill., 30 F. Supp. 875; *Pierce Consulting Engineering Co. v. City of Burlington, Vt.,* D.C. Vt., 15 F.R.D. 23; *United States v. Milhan,* D.C. E.D. N.Y., 15 F.R.D. 459; *General Cas. Co. of America v. Fedoff,* D.C.S.D. N.Y., 11 F.R.D. 177; *United States v. Dovolis,* D.C. Minn., 105 F. Supp. 914. * * *

We conclude that, in the case of a counterclaim which is compulsory, ancillary jurisdiction should extend to additional parties, regardless of an ensuing lack of diversity. This is the position taken by the commentators, Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure, supra, 45 Yale L. J. 393, 418, and the few courts which have ruled on the question. Carter Oil Co. v. Wood, supra, D.C.E.D. Ill., 30 F. Supp. 875; King v. Edward B. Marks Music Corp., D.C.S.D.N.Y., 56 F. Supp. 446; and see Black v. London Assur. Co. of London, England, D.C.W.D.S.C., 122 F. Supp. 330, where the court arrived at the desired result through realignment of

> the parties. We ourselves have come to the same conclusion in the past on the similar issue of venue requirements for additional defendants, see Lesnik v. Public Industrials Corp., supra, 2 Cir., 144 F. 2d 968, and with respect to impleader of third-party defendants under F.R. 14. Friend v. Middle Atlantic Transp. Co., 2 Cir., 153 F. 2d 778, 779-780, certiorari denied 328 U.S. 865, 66 S. Ct. 1370, 90 L.Ed. 1635. A liberal attitude toward the inclusion of parties is a necessary concomitant to the liberalized third-party practice authorized by the Federal Rules of Civil Procedure. The presence of these defendants is necessary to a complete adjudication of the issues involved in this litigation, which should not be retried at another time in another forum.
>
> Nothing in F.R. 13(a) compels a different result. True, that rule excludes from its definition of compulsory counterclaims those which require for their adjudication 'the presence of third parties of whom the court cannot acquire jurisidiction.' *This restriction should be limited to cases of inability to obtain personal jurisdiction over the additional defendants.*" * * * (Emphasis added.)

Further, this court has held that if the District Court has jurisdiction over the claim, it has jurisdiction over a counterclaim arising therefrom, notwithstanding that there are *no* independent grounds for Federal jurisdiction. (*Safeway Stores, Inc. v. Dunnell* (C.A. 9 1949), 172 F. 2d 649, *cert. den.*) This is true even though federal jurisdiction depends upon diversity of citizenship of the parties. In *Carter Oil Co. v. Wood* (E.D. Ill.), 30 F.S. 875, where the jurisdiction was based upon diversity of citizenship, the defendant interposed a counterclaim

against a citizen of the state of which the defendant was a citizen. It was held that no diversity of citizenships was required. The same result is reached in *The United States to Use of Foster Wheeler Corp. v. American Surety Co.* (S.D.N.Y. 1938), 25 F.S. 700 where the court said:

> "While it is true that because of lack of diversity of citizenship the intervening defendant could not sue the use plaintiff in this Court on the facts alleged in its counterclaim if these facts were set forth in an independent suit yet this fact does not deprive this Court of jurisdiction. The main action is brought under the statute of the United States (40 USC Sec. 270b); to this complaint must be set up all counterclaims arising out of the same transaction. Under such circumstances no independent jurisdiction is necessary for the assertion of the counterclaim (defective material)".

In *Abel v. Brayton Flying Service* (C.A. 5—1957), 248 F. 2d 713 judgment had been entered for plaintiff Brayton Flying Service. On appeal, defendant argued that one Brayton was an indispensable party who if joined would destroy the diversity of citizenship basis of jurisdiction. The court held that Brayton was not indispensable and further that defendant was not prejudiced by his absence. "Any relief to which Abel might have been entitled against Brayton arose out of the transactions which formed the subject matter of the suit. *A counterclaim for such relief would have been auxiliary to the action of which the District Court already had jurisdiction and needed no independent ground to support it.*" (p. 716) (Emphasis added.)

In *Rosenthal v. Fowler* (S.D.N.Y. 1952), 12 F.R.D. 388, which was not a diversity case, the court stated the rule as follows:

> "If a counterclaim is compulsory, the same jurisdiction which supports the main claim will also support the counterclaim."

Indeed this Court in *Northeast Clackamas C.E. CO-OP v. Continental Casualty Co.* (C.A. 9 1955) held in a parallel situation that diversity jurisdiction once acquired is not destroyed "by the intervention of a dispensable party of the same citizenship as the original plaintiff, if such intervention be without collusion and authorized by procedural rules" (p. 332). The *Foster Wheeler* case cited above is relied upon as authority. The court also suggests that it would follow the unanimous holdings of all Courts of Appeals which have considered the problem presented herein when it states, "other cases to the same effect although dealing with jurisdiction of claims asserted by parties brought in under Rules 13 and 14 are * * * (citing cases)" (p. 332).

To the same effect see *Moore v. New York Cotton Exchange*, 280 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750; *Dewey, etc. v. Johnson, etc.* (E.D.N.Y. 1939), 25 F.S. 1021; *United Artists Corp. v. Grinieff* (S.D.N.Y. 1954), 15 F.R.D. 395; *U. S. v. Rogers & Rogers* (S.D. Cal. 1958), 161 F.S. 132.

Diligent research has failed to turn up a single case in which a federal court has held that diversity jurisdiction once acquired is destroyed by joining a third party as party defendant to a compulsory counterclaim under Rule 13(a). The holdings of the reported decisions are unanimous to the contrary.

II. R. E. WHITE IS NOT AN INDISPENSABLE PARTY. FURTHER, THE DISTRICT COURT CAN ACQUIRE JURISDICTION OVER WHITE.

Appellees argue (1) that White is an indispensable party and (2) that joining White would destroy diversity of citizenship and divest the District Court of jurisdiction. However, the *only* facts cited in support of these allegations is an affidavit in support of a motion filed by appellant to stay action in the District Court because of another action pending in the State Court. *First,* that affidavit is *not* part of the record before this Court. Appellees have had sufficient time to make an appropriate motion under Rule 75 to have that affidavit and any other documents included as part of the record. Their failure to so do precludes any argument on their part based upon such document (*Bullen v. de Bretteville* (C.A. 9 1956) 239 F. 2d 824). *Second,* the *only* thing established by that affidavit is that White had commenced an action in the State Court and that appellant had cross-complained in that action asserting the same cause of action against appellees but also joining White as a joint tort-feasor. The record cited and relied upon by appellees does not even establish that White is a citizen of the State of California. Appellant, however, concedes that the record before this Court and the District Court would support by inference a finding that White is a resident of the State of California.

The record thus establishes at most that White is a resident of the State of California and that at the commencement of this action there was an action pending in the State Court which had the same subject matter as that asserted in the Sixth Counterclaim. There is no evidence

whatsoever in the transcript or the portion of the record in the District Court cited by appellees or any portion of the record in the court below to support an assertion or a finding that the District Court could not obtain personal jurisdiction over White. In view of the authorities cited above, the fact that White was a citizen of California is immaterial since diversity jurisdiction attached in the principal action and *would not be divested* if White were joined.

As a sidelight to this case, it is interesting to note that the District Judge who heard appellant's motion to stay the action in the District Court pending determination in the State Court referred to by appellees *denied appellant's motion.*

Further, White is not an indispensable party. As pointed out in appellant's opening brief, the Sixth Counterclaim sounds in tort. Appellees are alleged to have converted the so-called Gardner Field Assets. The answer sets up only a denial of that allegation. It may be that White is a joint tort-feasor and is equally guilty of the conversion alleged. This, however, does *not* make White an indispensable party. In appellant's opening brief the cases establishing this point are collected. Indeed the learned District Judge rejected the self-same argument made by appellees herein. Contrary to the assertion by appellees, the District Judge did not even seriously consider the possibility that White was indispensable. The District Judge was of the opinion that the pendency of another action prevented the Sixth Counterclaim from being justiciable in this action. Certainly if there were indispensable parties not joined the District

Judge would have said so. His failure to specify this as a ground is conclusive that he did not agree with appellees on this point.

III. CASES CITED BY APPELLEES ARE NOT IN POINT.

Appellees cite many cases to the effect that unless all parties on one side of the controversy have different state citizenship, from those on the other side, the requisite diversity does not exist. None of the cases cited involved a compulsory counterclaim to an action where the requisite diversity was established in the main action. Such cases as

Peninsular Iron Co. v. Stone, 121 U.S. 631;
Interstate National Bank etc. v. Luther, 221 F. 2d 382 (not 389);
Johnson v. Middleton, 175 F. 2d 535;
Telegraph Delivery Service v. Flausts Tel. Service, 12 F.R.D. 342,

are simply not in point. As pointed out above pages 4-8, the Supreme Court, this Court, as well as all other courts of appeals who have decided the issue are unanimous in their holding that once federal jurisdiction attaches, whether through diversity of citizenship or otherwise, a compulsory counterclaim will *not* divest the court of jurisdiction.

Appellees cite *Edmonston v. Sisk*, 156 F. 2d 300, to the effect that federal courts should not litigate matters better suited to state courts. Appellees fail to mention (1) that in that case the Court of Appeals affirmed the action of the District Court in so proceeding, (2) that in this case there is no factual predicate to support a statement

that this action "can be better settled in state court proceeding . . ." and (3) the law is well settled that

> "The pendency of a state court action in personam is no ground for abatement or stay of a like action in the federal court, although the same issues are being tried and the federal action is subsequent to the state court action. The federal court may not abdicate its authority or duty in favor of the state jurisdiction."

(*Ermentrout v. Commonwealth Oil Co.* (C.A. 5 1955), 220 F. 2d 527 at p. 530 and cases cited therein.) See also *Romero v. Wheatley* (C.A. 9 1955), 226 F. 2d 399.

The other cases relied upon by appellees are equally without merit.

CONCLUSION.

Appellees, citizens of California, commenced an action against appellant, a citizen of Nevada. The amount in controversy exceeds $3,000.00. The District Court thus acquired jurisdiction based upon diversity of citizenship. The Sixth Counterclaim is a compulsory counterclaim as defined in Rule 13(a). White is not an indispensable party and even if he were there is no evidence that the District Court cannot acquire personal jurisdiction over him. The District Court erred in dismissing the Sixth Counterclaim.

Dated, San Francisco, California,
September 28, 1959.

Respectfully submitted,
EVERETT S. LAYMAN,
KENNETH S. CAREY,
Attorneys for Appellant.

EVERETT S. LAYMAN, JR.,
ARTHUR J. LEMPERT,
Of Counsel.

No. 16465

United States
Court of Appeals
for the Ninth Circuit

UNION PAVING COMPANY, Appellant,

vs.

DOWNER CORPORATION, Appellee.

Transcript of Record

Appeal From The United States District Court For The Northern District of California, Northern Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—6-30-59

No. 16465

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, Northern District of California, Northern Division

No. 6960

DOWNER CORPORATION, a California Corporation; and RAY H. DOWNER,

Plaintiffs,

vs.

UNION PAVING CO., a Nevada Corporation,

Defendant.

FIRST AMENDED COMPLAINT

Now come the Plaintiffs above-named and file this, their First Amended Complaint, and for cause of action allege:

First Cause of Action

I.

That Plaintiff Ray H. Downer is a citizen of the State of California and resides at Stockton, San Joaquin County, California, in the above-named Division and District; that the Plaintiff Downer Corporation is, and at all times herein mentioned was, a California Corporation having its principal office and doing business in the City of Stockton, County of San Joaquin, State of California, and in the above-named Division and District; that the Defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State

of Nevada and is, and was, doing business at various places in the State of California; that the jurisdiction is founded only on diversity of citizenship; that the amount in controversy exceeds the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest;

II.

That on or about the 11th day of March, 1948, the Plaintiffs and the Defendant entered into a written Agreement, a true copy of which is attached hereto, marked "Exhibit A" and prayed to be read as a part hereof and incorporated herein as though the provisions thereof were herein fully set forth;

* * * * *

IV.

That under the terms of said Agreement, Plaintiffs and Defendant formed a joint venture for the purpose of carrying out certain work to be performed near Bakersfield, California, all within the County of Kern, for the Mt. Vernon County Sanitation District; that all of said work has been performed to the satisfaction of said Mt. Vernon County Sanitation District and has been accepted by said District;

* * * * *

/s/ FORREST E. MACOMBER,
/s/ GORDON J. AULIK,
Attorneys for Plaintiffs.

EXHIBIT "A"

This Agreement, made this 11th day of March, 1948, by and between Downer Corporation, a California corporation, and Ray H. Downer, its alter ego, parties of the first part, and Union Paving Co., a Nevada corporation, party of the second part,

Witnesseth:

Whereas, first party hereto has submitted a bid to the Board of Directors of Mt. Vernon, County Sanitation District in Kern County, California, on February 16, 1948, for the doing of certain sewer construction in said district on a unit price basis estimated at $763,966.85, plus incidental expenses for the specific units of work therein specified and has been awarded the contract by the said Board of Directors and upon the receipt of a written opinion from the first parties' attorney or attorneys reciting that all acts and legal proceedings required to be done precedent to the award of the contract have been done in strict accordance with the law, said first parties intend to and will execute the contract for the doing of said work and to complete the work called for under said contract and in accordance with the terms hereof; and

Whereas, the parties hereto have formed a joint venture for the purpose of carrying out and performing the work to be done under said contract and any additional private contract work to be performed in connection with said sanitary district sewer such as sewer laterals for house con-

Exhibit "A"—(Continued)

nections, under the name of Downer Mount Vernon Project; and

Whereas, it is desirable that the rights, interests, and obligations of the parties hereto, as such joint venturers under said contract, and any profits to be derived therefrom, and any liability for any and losses arising out of the performance of said work, or which may be incurred in connection therewith, be defined by an agreement in writing;

Now, Therefore, It Is Agreed as Follows:

1. First parties and second party agree to finance the doing of said work and to perform the said contract as a joint venture on the following basis:

(a) The bank of the joint venture shall be the Anglo California National Bank—Bakersfield Office, or such other bank or banks as the joint venture shall from time to time agree upon. All moneys, checks and other negotiable instruments as received shall be deposited in said bank to the credit of the joint venture in its General Account to be carried under said joint venture name. The withdrawal of moneys from said General Account shall be only upon two joint signatures, one of whom shall be a person designated by first parties and one of whom shall be a person designated by second party; it being understood and agreed that the first and second parties will designate for the purpose of convenience more than one person who may act on its behalf as such co-signer.

(b) In addition to the above General Account there shall be established in said bank two Special

Exhibit "A"—(Continued)

Joint Venture revolving accounts which are to be replenished weekly, if necessary, and against which payroll checks are to be issued in amounts not to exceed $200.00 for any one check and the other account for the payment of workmen employed on the job promptly they quit or are discharged; and checks in said two special accounts shall need only one signature, by a person to be agreed upon by the parties hereto.

(c) Upon or prior to the execution of said contract by Downer Corporation with said Sanitary District, second party shall forthwith deposit in the aforesaid mentioned bank to the credit of said joint venture the sum of $55,000.00, as an initial deposit on account of costs; and

(d) Second party agrees that it will pay or advance from time to time such further moneys as may be necessary to the conduct of said work over and above said initial deposit by second party. In that connection, the manager on or before the 5th day of each calendar month shall furnish to second party a statement of the additional funds that are anticipated to be required during said calendar month for the prosecution of said work in the judgment of said manager; and second party shall deposit in said account for the benefit of said joint venture the amount of such monthly estimate on or before the tenth day of such calendar month; and first and second parties acting through their respective agents, as co-signers, agree to promptly issue checks for and pay and discharge all liabili-

Exhibit "A"—(Continued)

ties arising under said contract in this joint venture.

(2) As additional security to the said second party for the repayment by the joint venture to it of moneys contributed by it to the joint venture, first party agrees immediately upon the execution of said contract to execute an assignment thereof to Union Paving Co. in proper form.

(3) Proper books of account shall be kept by a competent accountant, wherein shall be entered particulars of all moneys, materials, or effects belonging to or owing to or by the joint venture, or paid, received or sold or purchased in the course of the venture, and of all such transactions, matters, and things relating to said joint venture as are usually entered in books of account kept by persons engaged in a business of the like character. Said books of accounts, together with all letters, papers, or documents concerning or belonging to said venture shall be kept at the place of business of said venture, to be hereafter agreed upon, and each member of the said venture shall at all times have free access to and the right to inspect and copy the same.

(4) As soon as practicable after the first day of each month during the continuance of the work, an account shall be taken by said accountant (or by some other accountant to be agreed upon by the members of the joint venture) of all capital, assets and liabilities for the time being of said joint venture and a balance sheet and profit and loss state-

Exhibit "A"—(Continued)

ment shall be prepared and a copy thereof shall be furnished to first and second parties hereto, who shall be bound thereby unless some manifest error or errors shall need to be rectified.

(5) The first parties represent that they own an adequate amount of machinery, tools, plant and equipment required for the complete installation of said work, except as herein otherwise provided, and of sufficient capacity and of such character to insure sufficient progress of operations to carry the work to completion within the time specified in the contract. Said first parties agree to provide all said equipment for the construction of said work and warrant said equipment to be adequate and suitable to meet the above requirements so as not to hinder the diligent progress of the work. The second party agrees to furnish one crane and one bulldozer, and neither the first nor second party shall receive any compensation for the use of said machinery, tools, plant and equipment, other than the right to participate in the net profit in the proportions hereinabove set forth.

(6) None of the parties hereto will make any charge against the work for any ordinary overhead expense or for time which may be expended in connection with the work by any of the parties hereto, or their officers, agents or employees except only such officers, agents, and employees as may be employed in the joint venture in actually carrying on construction under the contract; and the rate of pay for any and all such employees shall be sub-

Exhibit "A"—(Continued)

ject to and require the approval of the other member.

(7) Ray H. Downer is to act as manager, without compensation, and in the event of the death or disability of said Ray Downer, the other party to this agreement shall mutually agree upon a manager for the joint venture in his place; and if the first parties shall make default under their said agreement with the Mt. Vernon Sanitation District, the second party herein may assume and take full and immediate charge and supervision and may use and adopt such measures and means as it may deem advisable to remedy the default and insure against further default.

(8) It is further understood and agreed that first party is required to give a statutory labor and material bond and a faithful performance bond covering the contract with said Sanitation District, and second party agrees to act as a co-signer with first parties upon the application to Pacific Indemnity Company for said bonds.

(9) In the event of the bankruptcy or the involuntary dissolution of any of the parties hereto, this joint venture shall cease and terminate. The successors or trustees of any party or parties hereto so dissolving or becoming bankrupt shall cease to have any interest in the work to be done under said contract and shall cease to have any interest in and to the assets of the joint venture. In any such case the remaining parties shall have the right to carry out and perform the remainder of the work

Exhibit "A"—(Continued)

to be done under said contract, and upon completion thereof such remaining joint venturer shall account to the successors or trustees of any such party or parties which may have become bankrupt or may have become dissolved and such successors or trustees of any such bankrupt or dissolved party shall, upon the completion of the work under said contract, be entitled to receive from the remaining joint venturer an amount equal to the sums advanced by the party they represent, plus such party's proportionate share of the profits resulting from the performance of the work under said contract to the date that the party they represent was dissolved or became bankrupt, less such party's proportionate share of the losses to said date, resulting from the performance of the work under said contract; provided, however, that the gain or loss computed as of said time shall be in the same proportion to the whole gain or loss resulting from the performance of all of the work under said contract as the amount of work done thereunder at said time bears to all of the work which is done thereunder. The books of the joint venture shall be conclusive in establishing whether such gain has been realized or loss sustained and the amount thereof.

The said joint venture hereby formed shall be terminated upon the fulfillment of and the acceptance of said work herein proposed to be performed and the collection of the monies and bonds payable and to be paid therefrom and the payment and discharge of all debts, claims and demands against

Exhibit "A"—(Continued)

said contract. The surplus monies or bonds remaining after the payment and discharge of all said debts, claims and demands shall be applied, first, to the repayment in full to second party of the cash contributed by it, and second, after said second party shall have been fully repaid its contribution, the net income remaining, if any, whether eventually in the form of cash or bonds shall be equitably distributed as follows: To the first parties 50% thereof, and to the second party 50% thereof, bonds and assessments being distributed at par.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.

DOWNER CORPORATION,
a California corporation,
By RAY H. DOWNER,
and
RAY H. DOWNER,
(First Parties.)

UNION PAVING CO.,
a Nevada corporation,
By J. A. DOWLING,
Pres.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 9, 1953.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM TO FIRST AMENDED COMPLAINT

Defendant, Union Paving Company, answers the First Cause of Action of the First Amended Complaint on file herein, and admits, denies, and alleges as follows:

* * * * *

Second Defense

I.

Answering paragraph I, defendant admits that the plaintiff Downer Corporation is, and at all times herein mentioned was, a California corporation, having its principal office and doing business in the State of California; and admits that the defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Nevada, and is, and was, doing business at various places admits plaintiff Ray H. Downer is a citizen of the State of California; in the State of California; and except as thus admitted, denies each and every allegation contained in said paragraph I.

* * * * *

III.

Answering paragraph IV, admits all of the allegations thereof; and in this connection alleges that subsequent to the execution of said written agreement and the formation of said joint venture the

parties thereto orally agreed that said joint venture would purchase from the War Assets Administration a certain sewage disposal system at Gardner Airfield, Kern County, California, and that a certain pump which was a part thereof would be used in said Mount Vernon Sanitation District Project and that the remainder of said Gardner Field surplus equipment would be sold and the proceeds of said sales retained by the said joint venture; that said Gardner Field Sewage Disposal System was purchased for and by said joint venture; and subsequent thereto as defendant is informed and believes and hence alleges, plaintiffs Downer and Downer Corporation wrongfully sold and converted a substantial portion of said Gardner Field Sewage System and converted the proceeds of said sale to their own use and have ever since failed and refused and do now refuse to account therefor to said joint venture or to defendant, although often requested to do so.

* * * * *

Third Defense

The First Cause of Action of said First Amended Complaint sets forth a claim growing out of a joint venture transaction; that said Mount Vernon joint venture continues in existence and the business and affairs thereof have not been wound up; and that there has been no termination or dissolution of the joint venture.

* * * * *

Counterclaim

For A First Counterclaim

I.

Plaintiff Ray H. Downer is a citizen of the State of California. Plaintiff Downer Corporation is a corporation incorporated under the laws of the State of California. Defendant Union Paving Company is a corporation incorporated under the laws of the State of Nevada. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000.00).

II.

On or about March 11, 1948, Plaintiffs and defendant entered into an agreement in writing, hereinafter called the Mount Vernon Joint Venture Agreement, a copy of which is attached to plaintiff's complaint herein as Exhibit "A", and which copy is hereby incorporated herein by reference.

III.

Defendant Union Paving Company has, at all times mentioned herein, done and performed all of the stipulations, conditions, and agreements stated in said written joint venture agreement to be performed on its part and in the manner therein specified.

IV.

On or about March 11, 1948, Downer Corporation, for and on behalf of said joint venture, entered

into a contract with the Board of Directors of said Mount Vernon County Sanitation District for completion of certain sewer construction in said district; that all of said construction has been performed to the satisfaction of said District and has been accepted by said District; and in this connection Defendant realleges and incorporates herein by reference all the allegations of Paragraph III of its Second Defense set forth above.

* * * * *

For A Sixth Counterclaim

I.

Defendant realleges and incorporates herein by reference all the allegations of Paragraphs I, II, III, and IV of its First Counterclaim set forth above.

II.

On or about February, 1949, plaintiffs wrongfully converted to their own use and parted with possession of a substantial portion of said Gardner Field surplus sewage system and sold, transferred, and delivered said property to persons unknown to defendant but known to plaintiffs.

III.

Plaintiffs have failed, neglected, and refused, and do now fail, neglect and refuse to account to defendant or to said joint venture for the profits made on said sales although often requested by defendant to do so.

IV.

All of said sales and transfers were made without the knowledge or consent or authorization of defendant and in violation of plaintiffs' fiduciary duty to defendant as a participant in said joint venture.

* * * * *

/s/ HENRY C. CLAUSEN,
Attorney for Defendant.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 2, 1954.

[Title of District Court and Cause.]

ANSWER TO "COUNTERCLAIM"

Now come the Plaintiffs, Downer Corporation, a California Corporation, and Ray H. Downer, and answering the "Counterclaim" on file herein admit, deny and allege as follows:

* * * * *

Answering the Sixth "Counterclaim", Plaintiffs admit, deny and alleges as follows:

I.

Plaintiffs incorporate herein by reference their answers to Paragraphs III and IV of the First "Counterclaim", which Paragraphs are incorporated by reference in Paragraph I of said Sixth "Counterclaim".

II.

Deny each and every, all and singular, the allegations contained in Paragraph II of said Sixth "Counterclaim"; deny that on or about February, 1949, or at any other time or at all Plaintiffs wrongfully or otherwise converted to their own use and parted with possession of a substantial portion or any of said Gardner Field surplus sewage system;

III.

Deny each and every, all and singular, the allegations contained in Paragraphs III and IV of said Sixth "Counterclaim".

* * * * *

/s/ FORREST E. MACOMBER,
/s/ GORDON J. AULIK,
Attorneys For Plaintiffs.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 10, 1954.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES PROPOUNDED BY DEFENDANT TO PLAINTIFF RAY H. DOWNER

Now comes the Plaintiff Ray H. Downer and files this, his Anwers to the Interrogatories Propounded by Defendant to Plaintiff Ray H. Downer pursuant to Rule 33, Federal Rules of Civil Procedure:

1. Did you ever have an agreement with R. H. White relating to a certain surplus sewage system located at Gardner Air Field, Kern County, which said system was purchased in March, April or May, 1949, in your name from the War Assets Administration?

Answer: Yes.

2. If your answer to interrogatory number 1 is yes, was the agreement written or oral? If written, attach a copy hereto. If oral, explain the agreement in detail.

Answer: Oral. The purchase of the Gardner Field surplus equipment from the War Assets Administration arose out of the following circumstances: Mr. J. A. Dowling, President of Union Paving Co., insisted upon ordering the sludge pump for the Mt. Vernon Project from the Chicago pump company himself, and in endeavoring to get it for a cheap price, delayed the ordering of it for several months. This was a special pump that had to be ordered from Chicago and there was a considerable delay on filling orders. As a result of Mr. Dowling's delay in ordering the pump, there was no sludge pump available to install in the Mt. Vernon Project when it was completed and, therefore, the project could not be accepted and until it was accepted the entire payments on the project were held up. The Union Paving Co.-Downer Corporation joint venture wanted to get the project accepted as quickly as possible, and Mr. R. E. White was the project engineer. In talking to Mr. White, he indicated that if we could get a used sludge pump

installed on the Mt. Vernon Project and make a complete test of the plant, he would be agreeable to accepting the project on behalf of the Mt. Vernon Sanitary District and when the new pump came from Chicago, it could be installed in place of the used pump, and this would expedite the entire payment on the project to the joint venture. Mr. White suggested that a sludge pump at Gardner Field was available, and in February, 1949, Mr. White and myself went to Gardner Field to investigate. There we talked with the custodian and he said that the plant had been put up for sale by the War Assets Administration on February 11 but that they had not received a satisfactory bid. I reported this entire matter to Mr. Dowling, the President of Union Paving Co., and he stated that it would be a good policy for Union Paving Co. and Downer Corporation to take Mr. White in on the purchase of the Gardner Field plant and Mr. Dowling requested me to purchase the Gardner Field plant from the War Assets Administration in my name and then sell one-half (½) interest in it to Mr. White for $2,000.00, but to keep it out of the joint venture between Downer Corporation and Union Paving Co., and that Union Paving Co. would advance the money to purchase the Gardner Field plant. In accordance with Mr. Dowling's suggestion, I asked Mr. White if he would be agreeable to purchasing the Gardner Field plant from the War Assets Administration as a joint venture between us—Mr. White to have a 50% interest therein and Downer Corporation to have a 50% interest

therein. I did not mention Union Paving Co.'s interest therein because Mr. Dowling specifically asked me not to do so. Mr. White was agreeable to this, and I telephoned him about February 18, 1949, and told him that I had offered $3,750.00 to the War Assets Administration for the plant but this was not acceptable but that they indicated that they would entertain an offer for $4,000.00. Mr. White said to go ahead and bid $4,000.00 and I submitted a bid to the War Assets Administration in my name personally to purchase the plant for $4,000.00. I explained this whole transaction to Mr. Dowling of the Union Paving Co. and on February 28, 1949, Union Paving Co. issued its Check No. 26901 for $500.00 to Norman L. Hawkins in payment for his services for "inspection on treatment plant equipment Gardner Field." This check was signed by R. H. Downer and J. A. Dowling. On February 28, 1949, Union Paving Co. issued its check No. 26902 for $4,000.00 and had it certified for the purchase of War Assets Administration Disposal No. RSF10-56 Item No. 10, T-501 Incinerator w/steel stack, etc., payable to the Treasurer of the United States. On February 28, 1949, Union Paving Co. issued its check No. 26903 for $300.00, as follows: For the faithful performance in connection with purchase of WAA Disposal No. RSF10-56, Item No. 10 T-501 Incinerator, etc. On July 27, 1949, Downer Mt. Vernon Project issued its check No. 630 for $4,800.00 as follows: Downer Mt. Vernon Project, Bakersfield, Calif., July 27, 1949, Pay to Union Paving Co. $4800.00, Purchase of Treatment

Plant Equipment Gardner Field $4800.00, By R. H. Downer, By J. A. Dowling.

On or about March 4, 1949, Mr. White gave me his check for $2,000.00, and since Union Paving Co. was not keeping its agreement to furnish the money for the payroll on time, I used this money to meet the payroll for the Union Paving Co.-Downer Corporation joint venture, and this was reflected on the books of the joint venture, with the result that this reduced the amount expended by the joint venture to $2,800.00 on the Gardner Field purchase. Some time thereafter, Mr. Dowling insisted that the Gardner Field operation should not be charged to the Downer Corporation-Union Paving Co. joint venture, and a change was made on the books of the joint venture to show that of the $2,800.00 expended to purchase Gardner Field for which reimbursement had not been received, $1,400.00 was chargeable to Union Paving Co. and $1,400.00 to Downer Corporation.

3. If your answer to interrogatory number 1 is yes, when was the agreement entered into?

Answer: On or about February 17, 1949.

4. If your answer to interrogatory number 1 is yes, did you ever receive any money from said R. H. White, relating to said sewage system?

Answer: Yes.

5. If your answer to interrogatory number 4 is yes, when did you receive said money? How much money did you receive?

Answer: On or about March 4, 1949, I received a check for $2,000.00 from R. E. White.

* * * * *

Dated: Stockton, California, September 5, 1957.

/s/ FORREST E. MACOMBER,
/s/ GORDON J. AULIK,
Attorneys For Plaintiffs.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed September 6, 1957.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES PROPOUNDED BY DEFENDANT TO PLAINTIFF DOWNER CORPORATION

Now comes the Plaintiff Downer Corporation, a California Corporation, and files this, its Answers to the Interrogatories propounded by Defendant herein pursuant to Rule 33, Federal Rules of Civil Procedure:

* * * * *

11. Did you or Ray H. Downer have any agreement with J. T. Masters or the J. T. Masters Company with respect to the Mount Vernon Sanitation District Project?

Answer: Yes.

12. If your answer to interrogatory number 11 was yes, was the agreement written or oral?

Answer: Oral.

13. If your answer to interrogatory number 12 was that the agreement was written, for your answer to this interrogatory, attach a true copy of said agreement. If your answer to interrogatory number 12 was that the agreement was oral, explain in detail the terms of the agreement.

Answer: With respect to the Mt. Vernon Sanitation District Project, Downer Corporation had an oral agreement with J. T. Masters, the terms of which in general were as follows: In Downer Corporation's bid there was an allowance of $224,000.00 for the construction of the treatment plant. Masters orally agreed that he would construct the plant for $200,000.00 plus one-half (½) of the difference between $200,000.00 and the amount of our allowance, to-wit: $224,000.00, for the construction of the sewage treatment plant, provided that he could build the plant for less than the sum of $224,000.00. There were difficulties encountered by Masters in building the plant and it actually cost him in excess of $224,000.00, so that he lost money on the transaction and built the plant for $200,000.00.

There was another matter that Masters was connected with, and that was as follows: Mr. R. E. White and myself entered into an oral agreement with J. F. Masters, of Fresno, California, by the terms of which Mr. Masters was to dismantle the Gardner Field plant, repair any damage to the realty, and remove the equipment, covered under the

purchase agreement, to locations in Bakersfield. Pursuant to this agreement with Mr. Masters, the property was removed from Gardner Field and was stored in Bakersfield, a portion at 1806 Oak Street and the remainder at 819 East Bundage Lane. In return for his services, Mr. Masters was to be reimbursed for all reasonable and necessary expenses for labor and materials required to accomplish the job. This reimbursement was to be made from the first money received from the sale of any of the equipment. After payment to Mr. Masters, the next proceeds of sale were to go to White, Downer & Dowling (Union Paving Co.) to reimburse them for money invested in plant. After return of our investment, all other sums derived from the sale of the property was to be divided one-half (½) to White, one-fourth (¼) to Downer & Dowling (Union Paving Co.), and one-fourth (¼) to Masters. Any property which was not sold and converted into cash was to be deemed to be owned in the same proportions.

Dated: Stockton, California, September 5, 1957.

/s/ FORREST E. MACOMBER,
/s/ GORDON J. AULIK,
Attorneys For Plaintiffs.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed September 6, 1957.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER TO "COUNTERCLAIM"

Now come the Plaintiffs herein and, pursuant to leave of Court first had and obtained, file this, their Amendment to Answer to "Counterclaim", and do hereby amend their Answer to "Counterclaim" on file herein by adding thereto an additional Paragraph IV to the Answer to the Sixth "Counterclaim", as follows:

IV.

Plaintiffs allege that at the time of the commencement of this action there was, and now is, another action pending between Plaintiffs herein and the Defendant herein and one R. E. White on substantially the same facts as set forth in this Defendant's Sixth "Counterclaim" herein; that said prior action was filed by the said R. E. White, as Plaintiff therein, on January 4, 1952, in the Municipal Court, Bakersfield Judicial District, County of Kern, State of California, against the parties to this action, as Defendants therein, and said prior action is now at issue and is pending now, pursuant to a change of venue, in the Superior Court of the State of California, in and for the City and County of San Francisco, being Action No. 416818 therein.

And the Plaintiffs herein do hereby further amend their Answer to "Counterclaim" on file

herein by amending the prayer thereto to read as follows, to-wit:

Wherefore, Plaintiffs pray that Defendant take nothing by virtue of its "Counterclaims" and that Plaintiffs have judgment as prayed for in their First Amended Complaint on file herein, and that this Court grant a stay of proceedings as to the Sixth, Seventh and Eighth "Counterclaims".

/s/ FORREST E. MACOMBER,
/s/ GORDON J. AULIK,
Attorneys For Plaintiffs.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed October 7, 1957.

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE ORDER

A pre-trial conference was held in the above-entitled case before Honorable Sherrill Halbert, Judge, on the 9th day of October, 1957, and the following action was taken:

* * * * *

4. The Defendant likewise has interposed counterclaims alleging that involved in this joint venture, the subject matter of this action, is a dispute over the purchase of certain surplus property from the United States Government called "Gardner Field." The Court has ordered the parties to sub-

mit briefs to the Court on that matter in order that this Court may determine whether or not it is a proper subject to be litigated in connection with the main action and whether this Court has any jurisdiction of that matter;

* * * * *

Dated at Sacramento, California, this 26th day of November, 1957.

/s/ SHERRILL HALBERT,
Judge of the United States
District Court.

* * * * *

[Endorsed]: Filed November 26, 1957.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

This case is before the Court at this time for a pre-trial determination of three issues, namely, (I) whether there has been an accounting between the parties (on this issue a limited trial has been held); (II) whether, if there has been an account stated between the parties growing out of the alleged accounting, an action based upon it is barred by the statute of limitations; and (III) whether defendant's sixth counterclaim may properly be included as part of this litigation.

* * * * *

III.

The sixth counterclaim sought to be asserted by defendant relates to the alleged conversion by plain-

tiffs of the so-called "Gardner Field" assets. Defendant alleges that during the course of the construction operations on the Mount Vernon Project, plaintiffs and defendant entered into an ancillary agreement for the purchase of certain surplus equipment (a sewage system at Gardner Field) from the War Assets Administration, some of which equipment was needed for the completion of the Mount Vernon Project. Thereafter, defendant alleges, plaintiffs wrongfully converted to their own use, and sold to third persons, the remainder of the Gardner Field assets without accounting to the defendant or the joint venture for the proceeds of such sale. It appears undisputed from the record that joint venture funds were used to purchase the Gardner Field assets from the War Assets Administration (In fact, the joint venture reimbursed defendant for the purchase money originally furnished by defendant).

Defendant concedes that the Gardner Field assets are the subject of litigation pending in the Superior Court of the State of California, in and for the City and County of San Francisco, in an action brought by one White (who was assertedly involved in the acquisition and disposition of the Gardner Field assets, but who is not a party to this action) to quiet title to the said assets in which both plaintiffs and defendant are joined as defendants. Under Rule 13(a) of the Federal Rules of Civil Procedure, a counterclaim is compulsory if it arises out of the same transaction or occurrence as the main action, "except that such a claim need

not be so stated if at the time the action was commenced the claim was the subject of another action pending". On file in that action (No. 416818) is a cross-complaint by defendant against White and the plaintiffs herein asserting substantially the same purported cause of action attempted to be plead by the sixth counterclaim. In the light of these facts, the Court cannot consider the sixth counterclaim a compulsory counterclaim under Rule 13(a) (See Meyercheck vs. Givens, 186 F. 2d 85, 87 [7th Cir.]; Esquire Inc. vs. Varga Interprises, Inc., 185 F. 2d 14, 18 [7th Cir.]).

To qualify as a permissive counterclaim under Rule 13(b), the claim must not arise out of the transaction or occurrence "that is the subject matter of the opposing party's claim". Under the most rational interpretation given to the words "transaction or occurrence" in Rule 13, however, the "Gardner Field" matter would, in the opinion of the Court, arise out of the same transaction or occurrence which forms the subject matter or the main action, for there is a very definite logical relationship between the Mount Vernon Project and the Gardner Field matter (United Artists Corp. vs. Masterpiece Productions, 221 F. 2d 213, 216 [2d Cir.]; Lesnik vs. Public Industrials Corporation, 144 F. 2d 968, 975 [2d Cir.]; In re Farrell Publishing Corporation, 130 F. Supp. 449, 452 [S.D.N.Y.]; and E. J. Korvette Co. vs. Parker Pen Company, 17 F.R.D. 267, 269 [S.D.N.Y.]). Therefore, the sixth counterclaim cannot qualify as a permissive

counterclaim, although it could qualify as a compulsory counterclaim but for the fact that it is presently asserted in a pending State Court action.

Concededly, defendant is left in a peculiar position with respect to its sixth counterclaim, but its opportunity to assert the claim, contrary to its contentions, is not subject to the whims and caprice of the plaintiffs herein and White. Sans some dereliction on the part of the defendant, its cross-complaint in that action, seeking affirmative relief as it does, will not be affected merely because the action filed by White in the State Court against defendant and plaintiffs may be subject to dismissal (under the provisions of § 583 of the California Code of Civil Procedure) for having been pending for more than five years. If the defendant is faced with any difficulty in connection with this cross-complaint, it will arise from its own dereliction in not bringing to issue and trial said cross-complaint within the five year period following the filing of the cross-complaint (See: Tomales Bay Etc. Corp. vs. Superior Court, 35 Cal. 2d 389, 394, 395).

This Court is, therefore, of the view that defendant's sixth counterclaim is improperly asserted in this action; the defendant having an available forum in the State Court in which the same claim is the subject of a pending action.

Conclusion

Based on what has been said above, the Court has reached the following conclusions:

1. There has been no accounting between the parties to this action (It follows that a special master will in due course be appointed to render such an accounting);

2. The action is not barred by the statute of limitations; and

3. The sixth counterclaim of the defendant is not a justiciable issue in this case.

Let a supplemental pre-trial order be entered accordingly. Plaintiff will prepare and lodge with the Clerk of this Court a form of formal supplemental pre-trial order pursuant to this memorandum and order.

Dated: January 9, 1958.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed January 9, 1958.

[Title of District Court and Cause.]

SUPPLEMENTAL PRE-TRIAL CONFERENCE ORDER

Subsequent to the Pre-Trial Conference Order made, entered and filed by this Court on the .. day of ....., 1957, the following proceedings were had:

A trial was had before the Court on Friday, November 29, 1957, on the following issues:

1. Has there been an account stated between the parties to this action.

2. Is Plaintiffs' action barred by the Statute of Limitations.

3. Does the Court have jurisdiction of the Sixth Counterclaim of the Defendant or, if the Court does have jurisdiction should it entertain said Sixth Counterclaim.

Evidence was presented to the Court on said limited issues on Friday, November 29, 1957, and thereafter both parties filed Memoranda of Points and Authories and thereafter, on January 9, 1958, the Court made and entered its Order determining said limited issues as follows:

1. There has been no accounting between the parties to this action and, therefore, no account was stated between the parties hereto.

2. Plaintiffs' action is not barred by the Statute of Limitations.

3. The Sixth Counterclaim of the Defendant is not a justiciable issue in this case and should not be entertained by this Court and is hereby dismissed.

The Court will in due course appoint a special master to render an accounting between the parties to this action.

Dated: February 5th, 1958.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed February 5, 1958.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Downer Corporation, Plaintiff, and Forrest B. Macomber and Gordon J. Aulik, Its Attorneys:

You and each of you will please take notice that on Monday, June 9, 1958, at the hour of 9:30 o'clock A.M. or as soon thereafter as counsel may be heard in the courtroom of the above entitled Court, Post Office Building, Sacramento, California, Union Paving Company will make the following motion, to said Court, to wit: that the Special Master heretofore appointed by said Court be instructed to include in the accounting ordered any and all transactions relating to the so-called Gardner Field transaction, or in the alternative that said Court make a final order of dismissal of defendant's counter-claim relating to said Gardner Field transaction. Said motion will be made upon all of the files and papers in said action, together with this Notice of Motion and the Memorandum of Points and Authorities attached hereto.

/s/ EVERETT S. LAYMAN,
Attorney for Defendant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed June 2, 1958.

In the United States District Court, Northern District of California, Northern Division

Civil No. 6960

DOWNER CORPORATION, a California corporation, Plaintiff,

vs.

UNION PAVING COMPANY, a Nevada corporation, Defendant.

ORDER DIRECTING ENTRY OF FINAL JUDGMENT AS TO A PORTION OF DEFENDANT'S CLAIMS AND FINAL JUDGMENT OF DISMISSAL

This Court having, in its Memorandum and Order duly made and entered January 8, 1958, concluded that defendant's sixth counterclaim (which said claim relates to the so-called Gardner Field transaction) is not a justiciable issue in this case and defendant having moved this Court on the 8th day of June, 1958, that this Court instruct the Special Master, heretofore appointed herein, to include said Gardner Field transactions in the accounting to be had or in the alternative to enter a final judgment of dismissal of said sixth counterclaim and the Court being fully advised in the premises has determined that there is no just reason for delay.

Now, Therefore, It Is Ordered that defendant's sixth counterclaim be and the same is hereby dismissed.

It Is Further Ordered that this judgment of dismissal be a final adjudication of the claim set forth in said sixth counterclaim.

Dated: October 23, 1958.

/s/ SHERRILL HALBERT,
United States District Judge.

Entered in Civil Docket, October 23, 1958.

[Endorsed]: Filed October 23, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL RE DOWNER CORPORATION

To the Clerk of the Above Entitled Court:

Please Take Notice that defendant, Union Paving Company, a Nevada corporation, appeals the judgment dismissing defendant's Sixth Counter-Claim, which said judgment was duly made and entered on October 23, 1958. Said appeal is taken to the Court of Appeals for the Ninth Circuit.

Dated: November 20, 1958.

/s/ EVERETT S. LAYMAN,
Attorney for Defendant.

[Endorsed]: Filed November 24, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated.

1. Complaint.
2. First amended complaint.
3. Motion to dismiss action.
4. Dismissal without prejudice as to second cause of action as set forth in first amended complaint only.
5. Order dismissing second cause of action, etc.
6. Answer and counterclaim to first amended complaint.
7. Answer to counterclaim.
8. Notice of motion to strike and of motion for a stay of proceedings under seventh and eighth counterclaims.
9. Order.
10. Interrogatories propounded to plaintiff Ray H. Downer.
11. Interrogatories propounded to Downer Corporation.
12. Answers to interrogatories propounded by defendant to plaintiff Ray H. Downer.

13. Answers to interrogatories propounded by defendant to plaintiff Downer Corporation.

14. Interrogatories propounded to Union Paving Co., a Nevada Corporation.

15. Amendment to answer to counterclaim.

16. Answers to interrogatories propounded to defendant.

17. Pre-trial conference order.

18. Memorandum & order.

19. Supplemental pre-trial conference order.

20. Order directing entry of final judgment as to a portion of defendant's claims and final judgment of dismissal.

21. Notice of appeal.

22. Stipulation dismissing appeal.

23. Notice of motion to strike stipulation from record.

24. Order granting motion to strike stipulation from record.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 4th day of May, 1959.

[Seal] C. W. CALBREATH,
Clerk,
/s/ By C. C. EVENSEN,
Deputy Clerk.

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the accompanying notice of motion is the original filed in this case in this Court and constitutes the supplemental record on appeal.

Dated: May 19th, 1959.

[Seal] C. W. CALBREATH,
Clerk,
/s/ By C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 16465. United States Court of Appeals for the Ninth Circuit. Union Paving Company, Appellant, vs. Downer Corporation, Appellee. Transcript of the Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: May 25, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

Docket No. 16465

UNION PAVING COMPANY, a Nevada corporation, Appellant,

vs.

DOWNER CORPORATION, a California corporation, Appellee.

DESIGNATION OF RECORD

To: The Clerk of the Above Entitled Court:

Appellant, Union Paving Company, hereby designates the following portions of the record to be printed as the record on appeal:

1. Paragraphs I, II and IV and Exhibit "A" to the Complaint.

2. The following portions of Appellant's (Defendant's) Answer to the Complaint:

a) Paragraphs I and III of the second defense to said Answer.

b) The third defense.

c) Paragraphs I, II, III and IV of the First Counter-Claim.

d) All of the Sixth Counter-Claim.

3. Appellee's Answer to Appellant's Sixth Counter-Claim.

4. The following Interrogatories and Answers to Interrogatories by Ray H. Downer:

Nos. 1, 2, 3, 4 and 5.

5. The following Interrogatories and Answers thereto by Downer Corporation:

Nos. 11, 12 and 13.

6. Appellee's Amendment to its Answer to Appellant's Counter-Claims, which said Amendment was filed October 4, 1957.

7. Paragraph 4 of the Pre-Trial Conference Order.

8. The Preamble, Paragraph III and the Conclusion to the Memorandum and Order made by Judge Halbert and filed January 9, 1958.

9. All of the Supplemental Pre-Trial Conference Order.

10. Notice of Motion filed by Appellant on or about May 30, 1958, which said Notice stated that Appellant would move the District Court to instruct the Special Master to include in the accounting any and all transactions relating to the so-called Gardner Field transaction or in the alternative that said Court make a final order of dismissal of Appellant's Sixth Counter-Claim.

11. The Order directing entry of final judgment as to a portion of Appellant's claims and final judgment of dismissal.

12. Appellant's Notice of Appeal.

13. This Designation of Record.

Respectfully submitted,

/s/ EVERETT S. LAYMAN,
Attorney for Appellant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed May 15, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL

The District Court erred in that:

1. It refused to hear a counter-claim in which it had jurisdiction of the subject matter and of all necessary parties.

2. The Gardner Field matter was an essential portion of the accounting before the Court.

3. There was no other Tribunal in which the cause was triable at the time the District Court dismissed Appellant's Sixth Counter-claim.

4. The Sixth Counter-claim was either a permissive or a compulsory counter-claim.

Respectfully submitted,

/s/ EVERETT S. LAYMAN,
Attorney for Appellant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed May 29, 1959. Paul P. O'Brien, Clerk.

No. 16469

United States Court of Appeals

For the Ninth Circuit

M. M. ZENOFF, COMMERCIAL CREDIT CORPORATION and SOUTHWESTERN PUBLISHING COMPANY, INC.,

Appellants,

vs.

CHARLES J. KETCHAM, doing business as Lake Motors and Studebaker Sales and Service, and Studebaker Packard Sales Agency,

Appellee.

Appeal from the United States District Court for the District of Nevada

BRIEF FOR THE APPELLANT

MAGLEBY & POSIN
ALBERT M. DREYER
109 South Third Street
Las Vegas, Nevada
Attorneys for Plaintiff

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NO. 16469
UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

M. M. ZENOFF, COMMERCIAL CREDIT CORPORATION and SOUTHWESTERN PUBLISHING COMPANY, INC.,

Appellants,

vs.

CHARLES J. KETCHAM, doing business as Lake Motors and Studebaker Sales and Service, and Studebaker Packard Sales Agency,

Appellee.

APPELLANTS' OPENING BRIEF

JURISDICTION

This is an appeal from an order dismissing a petition to have the Appellee adjudicated an involuntary bankrupt. The jurisdiction of the District Court was invoked under Sections 2(1) and 32(b) and (c) of the Bankruptcy Act (11 U.S.C. Sec. 11(1) and 55(b) and (c)). The order dismissing the proceedings was signed and filed on February 26, 1959 (R 41-47). It was not entered on the bankruptcy docket until March 3, 1959, nor was any notice of the entry thereof given until the last mentioned date when it was given by mail. Notice of Appeal was filed on April 3, 1959 (R 47). The jurisdiction of this Court is invoked under the provisions of Sections 24 and 25 of the Bankruptcy Act (11 U.S.C. 47 and 48).

STATEMENT OF THE CASE

On March 1, 1957, the petitioning creditors, M. M. Zenoff, U. S. Tire Supply, Inc., and Commercial Credit Corporation, filed their petition to have Appellee, Charles J. Ketcham, adjudged an involuntary bankrupt (R. 3-6). Upon the filing of the petition, a general order of reference was made, referring the proceedings to the Honorable John C. Mowbray, one of the Referees in Bankruptcy of the Court below (R. 7). Appellee filed an answer to the petition, wherein, among other things, he challenged the jurisdiction of the District Court on the ground that for more than six months before the filing of the petition he had been a resident of the State of California and that he neither resided in, nor had his domicile or a place of business within, the District of Nevada for a longer portion of six months next preceding the filing of the petition (R. 7-9). The alleged bankrupt, Charles J. Ketcham, having, between the date of the filing of the petition and the date of the filing of his answer, paid one of the petitioning creditors, U. S. Tire Supply, Inc. (R. 62-63), an amended and supplemental petition was filed in which Southwestern Publishing Co., Inc. was substituted as a petitioning creditor (R. 15-18). Thereafter, the matter came on for hearing before the Referee on April 15, 1957, it being stipulated that the Appellee's answer to the original petition should stand as his answer to the amended and supplemental petition, except that he admitted his indebtedness to Southwestern Publishing Co., Inc. in the sum of $167.25 (R. 57). At this hearing, Appellee again urged his challenge to the jurisdiction of the District Court to entertain the proceedings. It was shown, however, that Appellee had previously operated an automobile business in Las Vegas, Nevada; that the great majority of the Appellee's creditors were Nevada residents, and the greater part of his assets were located in that State (R. 58, 61-63, 64). A second supple-

mental and amended petition was filed to allege these facts (R. 19-22).

Concurrently with the filing of the original petition a petition for an injunction to restrain the foreclosure sale under a deed of trust covering real property comprising the greater part of the Appellee's assets was filed by the petitioning creditors (R. 9-12). On the basis thereof, the Referee issued a temporary restraining order and order to show cause, restraining the threatened foreclosure sale (R. 13-14). The order to show cause why an injunction permanently restraining the foreclosure sale should not issue was originally made returnable on March 22, 1957. By stipulation of counsel, the hearing thereon and the temporary restraining order were continued until the hearing on the petition to adjudicate the Appellee a bankrupt (R. 92). At that hearing, it was shown that the value of the property subject to the deed of trust exceeded by at least $50,000.00 the amount of the obligation which the trust deed secured (R. 62, 78), and that this equity would be lost to the general creditors of the Appellee if the foreclosure sale were allowed to proceed. At the conclusion of the hearing, the Referee ordered that the temporary restraining order be continued in effect, pending a further order in the proceeding (R. 93).

On June 18, 1957, the Referee signed an order in which he found "that the respondent Charles J. Ketcham is now and has been for more than six months prior to March 1, 1957 a resident of and domiciled within the State of California, and the Court is, therefore, without jurisdiction; that accordingly, said petition should be dismissed with costs." This order was not transmitted to, or entered, by the Clerk of the Court below, as required by Section 39(a) (9) of the Bankruptcy Act (11 U.S.C. 67(a) (9)) and General Order No. 1 until June 26, 1957, nor were petitioning creditors given any notice of the signing, making

or entry of the order before that date, when notice of the entry thereof was mailed to them by the Clerk. The time within which a petition for the review of that order might be filed, therefore, ran from that date (**Rosenberg v. Heffron**, 9 Cir., 131 F. 2nd 80) and did not expire until July 6, 1957. On that date, having as a precautionary measure obtained an order from the Referee extending the time for filing such a petition (R. 24), the petitioning creditors, the Appellants here, filed their petition for review of the Referee's order dismissing the proceedings (R. 24-27). Appellants first endeavored to file the petition for review with the Referee, but the latter's Clerk refused to accept it on the ground that the Referee had concluded the case and, in accordance with the requirements of Section 39 (a) (10) of the Bankruptcy Act (11 U.S.C. 67(a) (10)) had transmitted to the Clerk of the Court below all of his records in the case. Having no other alternative in the circumstances, Appellants filed the petition for review with the Clerk of the Court below.

Within a day or so of the time that Appellants first learned of the Referee's order dismissing the proceedings, Appellants filed with the Court below a petition to vacate and set aside the foreclosure sale on the ground that it had been made before the time within which Appellants might petition for review of the Referee's order dismissing the proceedings had expired (R. 28-32).

On September 9, 1957 the Court entered an order denying both the petition for review and the petition to vacate and set aside the foreclosure sale (R. 33). On September 24, 1957, the Appellants moved to vacate this order on two grounds:

(a) The petitions denied by said order were not at the time of the entry of said order properly before the Court for the reason that as of that time the Referee had not

made or filed his certificate of the proceedings had before him as required by Section 39 (a) (8) of the Bankruptcy Act (11 U.S.C. 67 (a) (8)), and the Court did not have before it the record necessary to its passing upon said petitions.

(b) The petitioning creditors were afforded no opportunity to be heard in support of said petitions.

The Court thereupon modified the order so as to provide "that each of the said petitions be, and the same are hereby, dismissed without prejudice." The reasons for making this modification were recited in the order making it as follows:

> " * * * and it appearing to the Court that the provisions of Section 39 (a) (8) had not been complied with in that there was not now before this Court the Referee's certificate on petition for review; that petitioners could not comply with said section until such time as the Referee did file such certificate; that the facts as now presented to the Court indicate that petitioners should not be prejudiced because of the failure of the Referee to file such certificate; and to that end the order entered by the Court on the 9th day of September, 1957, should be amended; * * * "

Thereafter, the Referee filed his certificate on Appellants' petition for review (R. 37-40). This certificate was not filed until February 10, 1958 (R. 40). On February 26, 1959, the Judge of the Court below entered an order dismissing the proceedings, without passing upon the merits of either Appellants' petition for review of the Referee's order dismissing the proceedings, or Appellants' petition to vacate the foreclosure sale. This order was not entered on the bankruptcy docket until March 3, 1959, on which

day the Clerk of the Court below mailed notice of the entry thereof to all interested parties (R. 47). Notice of appeal was filed on April 3, 1959 (R. 47).

SPECIFICATION OF ERRORS

1. The Referee erred in dismissing the proceedings for want of jurisdiction.

2. The Judge of the Court below erred in refusing to pass upon Appellants' petition for review on its merits.

3. The Judge of the Court below erred in refusing to vacate and set aside the foreclosure sale under the trust deed.

4. The Court below erred in making the order dated February 26, 1959.

ARGUMENT

I.

THE REFEREE ERRED IN DISMISSING THE PROCEEDING FOR WANT OF JURISDICTION.

Section 2 of the Bankruptcy Act (11 U.S.C. 11) provides:

"(a) The Courts of the United States * * * are hereby invested within their respective territorial limits * * * with such jurisdiction at law and in equity as will enable them to exercise original proceedings under this Act * * * to

> "(1) Adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction. * * *"

Section 32 of the Bankruptcy Act as amended in 1952 (11 U.S.C.A. Supp. 55; 66 Stat. 424) provides in pertinent part as follows:

> "(b) Where venue in any case filed under this Act is laid in the wrong court of bankruptcy, the Judge may, in the interest of justice, upon timely and sufficient objection to venue being made, transfer the case to any other court of bankruptcy in which it could have been brought.
>
> "(c) The Judge may transfer any case under this title to a court of bankruptcy in any other district, regardless of the location of the principal assets of the bankrupt, or his residence, if the interests of the parties will be best served by such transfer."

Under these provisions, even if this case had not been brought in the proper district, as prescribed by Section 2 of the Act, the Court should, nevertheless, have retained jurisdiction of the case if the interest of justice so required. Thus, in **In re Lada Radio & Electric Co.**, 132 F. Supp. 89, 90, the Court said:

> "Subdivision (b) is more restricted. Instead of being applicable to any case, it comes into play only where a case is 'laid in a wrong court of bankruptcy' and even then the court is limited to a transfer 'to any other court of bankruptcy in which it could have been brought.' Thus subdivision (b) deals only with proceedings brought in the wrong district and gives power to transfer such a proceeding only to a district in which it could have been brought. Moreover, this can only be done in the interest of justice. That sounds as if Congress were directing that a case laid in the wrong district should stay there unless the interest of justice required that it be transferred to a district where it ought to have been brought. I cannot believe

that this is the correct interpretation of the subdivision. A somewhat more reasonable interpretation is that the intention of Congress was to provide that a case laid in the wrong district need not be dismissed if the interest of justice requires that it be transferred to a district in which it could have been brought. Still a third interpretation, and the interpretation which I adopt, is to be found in the report of the House Judiciary Committee which accompanied the bill. House Report No. 2320 on S. 2234, 82nd Cong., 2d Sess. 1952. It deals with this subdivision (b) referring to it as the first of the subdivisions which the bill proposed to add, and says, 'Under this first subdivision, the Judge may, upon timely and sufficient objection, transfer a case brought in the wrong court of bankruptcy * * * Ordinarily, no doubt the venue rules in bankruptcy will serve the interest of justice, but in the event that in a special case they do not, the Judge will have discretion to retain the proceeding.'

"Thus we have subdivision (c) which permits a transfer of a case 'if the interests of the parties will be best served' and subdivision (b) which, as interpreted by the House Committee, permits the retention of a case in the wrong district in the interest of justice.' The whole field is thus covered. A case rightly or wrongly brought within a district may be **transferred** wherever convenience, represented in one case by the 'interests of the parties' and in the other 'interest of justice' requires. A case rightly brought within a district may, of course, be **retained** there if the interest of justice requires, and under subdivision (b) a case wrongly brought within a district may be **retained** there if the interest of justice requires."

The rules announced in **In re Lada Radio & Electric Co., supra,** were followed by the United States Court of Appeals

for the Tenth Circuit in **In re Martinez,** 241 F2d. 345. In that case the trial court dismissed a bankruptcy on the ground that it had been brought in the wrong district. The Court of Appeals reversed, saying:

> "Under Subsection C of Section 32 the Judge could transfer the instant case to a court of bankruptcy in any other district if the interests of the parties would be best served by such transfer, and under Subsection B of Section 32 the court in the absence of objection could retain the proceeding in the instant case unless it concluded that the interest of the parties would be best served by a transfer to some other district."

In view of the foregoing, it is plain, we submit, that since the amendment to Section 32 of the Bankruptcy Act in 1952 (66 Stat. 424) the provisions of Section 2(a) (1) of that Act (11 U.S.C. 11) can no longer be treated as a limitation on the jurisdiction of the court, but only as a provision prescribing venue. Under Section 32, as amended, if a proceeding is brought in a wrong district, the Court must either transfer the proceeding to the proper district or retain jurisdiction thereof, as the interest of the parties and justice might require. It cannot, however, dismiss the proceeding.

In the case at bar, the interests of the parties and of justice required that the Court retain jurisdiction. All of the debtors' assets (with negligible exceptions) were located in the District of Nevada. Most, if not all, of his debts were contracted in that District, and the great majority of his creditors were either residents of Nevada or had places of business therein.

The order of the Referee dismissing the proceeding for want of jurisdiction was, therefore, plainly erroneous.

II.

THE COURT BELOW ERRED IN REFUSING TO PASS UPON APPELLANTS' PETITION FOR REVIEW ON THE MERITS.

Appellants' petition for review of the Referee's order dismissing the proceeding was filed on July 6, 1957, well within the time permitted by law, and the Referee's order extending the time for filing it. The petition, it is true, was filed with the Clerk of the Court below and not with the Referee, as provided by Section 39(c). The reason for this, as hereinbefore recited, was that the Referee had closed the case and, in accordance with the requirements of Section 39(a) (10) of the Bankruptcy Act (11 U.S.C. 67 (a) (10)) had transmitted to the Clerk of the Court below all of his records in the case, and for that reason the Referee's Clerk refused to accept the petition. Plainly, therefore, the Appellants had no other course to follow than to file the petition with the Clerk. Quite apart from this fact, however, the Referee treated the petition for review as having been properly filed before him, as he filed, in pursuance of that petition, the required certificate for the purpose of permitting his order to be reviewed. **In re Wood,** 6 Cir., 248 F. 246; **certiorari** denied, 247 U.S. 512; 62 L. Ed. 1243; 38 S. Ct. 579. The case last cited was decided before Subsection (a) 8 and Subsection C, Section 39 of the Bankruptcy Act (11 U.S.C. 67 (c)) were added by the Chandler Act (30 Stat. 555) in 1938. But at that time, General Order in Bankruptcy 27 was in effect. That General Order was substantially identical to Subsections (a) (8) and Subsection c of Section 39, the present statutory provisions differing from General Order 27 only in this: That whereas the present statutory provisions limit the time within which a petition for review may be filed to ten days, General Order 27 did not, in express terms, limit the time for filing a petition for review, although a ten day limitation was,

by judicial construction, read into it. General Order 27 provided as follows:

> "When a bankrupt, creditor, trustee or other person shall desire a reviewing by the Judge of any order made by the Referee, he shall file with the Referee his petition therefor, setting out the error complained of; and the Referee shall forthwith certify to the Judge the question presented, a summary of the evidence relating thereto, and the finding and the order of the Referee thereon."

Subdivision (c) of Section 39 provides:

> "A person aggrieved by an order of the Referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the Referee a petition for review of such order by a Judge and serve a copy of such petition upon the adverse parties represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of the parties in interest."

Subsection (a) (8) provides:

> "(a) Referees shall * * * prepare promptly and transmit to the clerk certificates on petitions for review or orders made by them, together with a statement of the statements presented, the findings and orders thereon, the petition for review, a transcript of the evidence thereof, and all exhibits."

In the **Wood** case, **supra**, the petition for review was filed with the Clerk. The Referee made and filed a certificate in pursuance thereof. The Court of Appeals held

that the petition was as effective as if filed in the first instance with the Referee and later by him filed with the Clerk.

The petition for review must, therefore, be deemed to have been properly and timely filed.

The Court below denied Appellants' petition for review because it had, by the order dated September 9, 1957, as modified by the order dated October 8, 1957, denied the petition and no new petition had been filed. But, as we have heretofore pointed out, the only reason that the petition was then denied was that the Referee's certificate had not been filed.

We submit that the Judge of the Court below erred in refusing to pass on the petition for review on the merits.

III.

THE COURT BELOW ERRED IN REFUSING TO VACATE AND SET ASIDE THE FORECLOSURE SALE.

The Court below, we submit, was clearly in error in refusing to vacate and set aside the foreclosure sale of the alleged bankrupt's principal asset.

There is a division of authority as to whether or not a mortgage or trustee under a deed of trust containing a power of sale may sell the property after the filing of a petition in Bankruptcy Court. See **Collier on Bankruptcy**, 14th Edition, Vol. 1, Sec. 2.62(2), p. 285 and the cases collected in the annotations in 112 ALR 508 at p. 515, **et seq.** This question, however, is not presented in this proceeding for the reason that an injunction against the sale of the property by the trustee, enjoining it from selling the property, had been applied for and a temporary order had been issued, and the sale was made while the petition for

review was pending. In these circumstances, the sale is subject to being vacated under the well established principle that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined, the Court may, by mandatory order, restore the **status quo.**

Porter v. Lee, 328 U.S. 246, 251; 66 S.Ct. 1096; 90 L. Ed. 1199,

Texas and New Orleans R. Co. v. Northside Belt R. Co., 276 U.S. 479; 48 S. Ct. 361;

Henderson v. Flickinger, 136 F. 2d 381.

In the **Porter** case Mr. Justice Black expressed the rule as follows:

> "It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined, the court may by mandatory order restore the status quo."

This rule, as the above cited cases show, applies even where the injunction has been denied by the trial court and the acts sought to be enjoined are completed during the pendency of an appeal.

CONCLUSION

It is respectfully submitted that the order appealed from should be reversed and the court remanded with instructions to set aside the Referee's order dismissing the proceeding for want of jurisdiction and to determine on its merits Appellants' petition to vacate the foreclosure sale.

Respectfully submitted,

MAGLEBY & POSIN, and
ALBERT M. DREYER

By_____

Receipt of copy of the foregoing brief is hereby admitted this _____ day of November, 1960.

HAWKINS, CANNON & KELLY

By_____

GOLDWATER & SINGLETON

By_____

Attorneys for Appellee

No. 16,469

United States Court of Appeals

For the Ninth Circuit

M. M. ZENOFF, COMMERCIAL CREDIT CORPORATION and SOUTHWESTERN PUBLISHING COMPANY, INC.,

Appellants,

vs.

CHARLES J. KETCHAM, doing business as LAKE MOTORS and STUDEBAKER SALES AND SERVICE, and STUDEBAKER PACKARD SALES AGENCY,

Appellee.

APPELLEE'S ANSWERING BRIEF.

HAWKINS, CANNON & HAWKINS,
By GORDON L. HAWKINS,
112 North Third Street, Las Vegas, Nevada,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 16,469

IN THE

United States Court of Appeals

For the Ninth Circuit

M. M. ZENOFF, COMMERCIAL CREDIT CORPORATION and SOUTHWESTERN PUBLISHING COMPANY, INC.,

Appellants,

vs.

CHARLES J. KETCHAM, doing business as LAKE MOTORS and STUDEBAKER SALES AND SERVICE, and STUDEBAKER PACKARD SALES AGENCY,

Appellee.

APPELLEE'S ANSWERING BRIEF.

STATEMENT OF THE CASE.

Petitioning creditors filed an original petition to declare Charles J. Ketcham an involuntary bankrupt on March 1, 1957, alleging that Charles J. Ketcham "has had his principal place of business within the above judicial district." (R 3-6.)

Charles J. Ketcham's answer was filed on March 8, 1957, alleging that for more than six months prior to March 1, 1957, he had not had his residence within

Nevada, and denying that he had had his principal place of business within the district within six months prior to March 1, 1957. (R 7-9.)

On or about April 13, 1957, the petitioning creditors filed an amended and supplemental petition without changing any material allegation of the original petition. (R 15-18.)

On the 15th day of April, 1957, a hearing was held by the Hon. John C. Mowbray, Referee, upon the original petition and the amended and supplementary petition and the answer of Charles J. Ketcham thereto. (R 49-93.)

At the said hearing the only evidence introduced as to the residence and place of business of the alleged bankrupt was that he resided at Las Vegas, Nevada, from April 10, 1952, to November 15, 1955, and operated a business in Las Vegas and Henderson, Nevada, during the same period of time. (R 58.)

The alleged bankrupt resided at San Bernardino, California, from December 7, 1955, to the date of the hearing. (R 64.)

At the time of the hearing, the Referee also considered the second amended and supplemental petition of the petitioning creditors. (R 19-22; R 41.)

Thereafter and on the 18th day of June, 1957, the Referee entered his order dismissing the petition (R 23) and on August 14, 1957, filed his Findings of Fact and Conclusions of Law which are not included in the record. From this Order the petitioning creditors filed a petition for review which was denied without

prejudice by this Honorable Court's order of September 9, 1957, as modified on October 8, 1957. (R 33 and 35-37.)

ARGUMENT.

I. THE JUDGMENT OF DISMISSAL SHOULD BE AFFIRMED.

The Referee found (R 23) that the alleged bankrupt had not resided within the District of Nevada and had no principal place of business within the District of Nevada within six months prior to the date of the filing of the petition and that he was a resident of the United States and resided and had a principal place of business within the United States and outside the District of Nevada for the same six months period prior to the date of filing the petition.

On a petition for review the District Judge sits as a Court of Appeal and shall accept the Referee's findings unless clearly erroneous. (General Order 47.)

The Referee concluded as a matter of law that the Court was without jurisdiction and dismissed the petition.

The jurisdiction of the bankruptcy Court is outlined in Section 2 of the Bankruptcy Act (USCA Title 11, Sec. 11), as follows:

> "* * * within their territorial limits * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction * * * to * * * (1) Adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months,

> or for a longer portion of the preceding six months than in any other jurisdiction, or who do not have their principal place of business, reside or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States, and have property within their jurisdictions, or in any cases transferred to them pursuant to this Act;".

It is quite evident that the alleged bankrupt does not fall within any of the classes set forth in this Section.

However, the appellants claim that this Court should retain jurisdiction because of Section 32 of the Bankruptcy Act. (USCA, Title 11, Section 55.)

This section does not confer jurisdiction in any case not provided for by the aforesaid Section 2, but provides for *transfer* by the *Judge* upon timely objection or application.

The appellants requested that the lower Court *retain* jurisdiction of this case even though they acknowledge that the jurisdictional elements are lacking. They cite as supporting authority *In re Fada Radio & Electric Co.,* 132 F. Sup. 89, and *In re Martinez,* 241 F.2d 345, as supporting their theory.

In the *Fada* case, the Court, while stating that the petition was wrongly filed, assumed that it could retain the case, but, in fact, transferred it to a Court it could be properly brought in.

The lower Court in the *Martinez* case (140 F. Supp. 221) held that Section 2 set forth its jurisdiction and it was powerless to do anything but dismiss the case.

The Court of Appeals held, however, by changing the word "jurisdiction" in Section 2 to the word "venue" that the Court the petitions were originally filed in could retain jurisdiction and adjudge the petitioner a bankrupt.

One large distinction lies between the instant case and the *Fada* and *Martinez* cases above. In both of those cases, the matter involved a *voluntary* petition while this case involves an involuntary petition. The Court in the *Martinez* case said (241 F.2d 345, 349):

> "Obviously, the power of the Court in its discretion to retain the proceedings must be based on the theory of *consent* or *waiver*" (Emphasis added).

There is certainly no consent or waiver in the instant case.

A diligent search of the reports fails to disclose any case directly in issue involving an involuntary petition.

In any event, the Referee was unable to do anything but dismiss, since even under Section 32 (USCA Title 11, Section 55) any *transfer* must be made by the Judge, and no application to *transfer* has been made to the Judge.

II. APPELLANTS HAVE APPEALED FROM THE WRONG ORDER.

The appellants filed their petition to review on July 6, 1957. (R 27.) The Judge entered his order denying

the prayer of the petition on September 9, 1957. (R 33.) Appellants filed their motion to vacate this order on September 24, 1957. (R 34.) On this motion the Judge entered his order modifying the previous order to read:

> "Ordered, that each of said petitions, be, and they are hereby, dismissed without prejudice, it appearing that the Court has no jurisdiction to hear the matters presented in the petitions at this time." (R 36.)

No appeal or further modification was sought by appellants and no new petitions were filed. Thereafter the Judge said,

> "the Court will assume that the petition for review was properly filed with the Referee in the first instance." (R 43.)
>
> "It is to be noted here that even though the two petitions hereinabove referred to were dismissed without prejudice * * *, no further petition has been filed in this matter. In short, petitioners have done nothing more than ask that the corpse of their original petition for review be exhumed and revivified." (R 44-45.)

Appellants argue here that the petition for review should be heard on its merits. This remedy should have been sought by appeal from either the order of September 9, 1957, or of October 8, 1957, and not by appeal as in the present appeal. The appellants are too late to review the reasons for the Judge's dismissal of the petition, and having been dismissed, the Judge was correct in holding that there was nothing for him to act upon.

III. THE SALE SHOULD NOT BE SET ASIDE.

Section 39(c) (USCA, Title 11, Section 67(c)) provides that any person aggrieved by an order of the Referee may file a petition for review and "upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the Court upon such terms as will protect the rights of all parties in interest."

The Referee's order was entered on June 18, 1957 (R 23), and served upon attorneys for appellants on June 25, 1957. (R 31.) The petition for review was filed on July 6, 1957. (R 24-27.) Nowhere in the record is there application for a stay order, either to the Referee or to the Judge.

Upon dismissal of a petition, any injunction based thereon is vacated as a matter of law. (43 CJS 984, Sec. 244.)

The cases cited by appellants state correct law, when there is an injunction in force. The rule is different when an injunction is not in existence.

CONCLUSION.

This Honorable Court should affirm the order of the District Judge.

Dated, Las Vegas, Nevada,
February 17, 1961.

Respectfully submitted,
HAWKINS, CANNON & HAWKINS,
By GORDON L. HAWKINS,
Attorneys for Appellee.

No. 16469

United States
Court of Appeals
for the Ninth Circuit

M. M. ZENOFF, COMMERCIAL CREDIT CORPORATION and SOUTHWESTERN PUBLISHING COMPANY, INC., Appellants,

vs.

CHARLES J. KETCHAM, doing business as Lake Motors and Studebaker Sales and Service and Studebaker-Packard Sales Agency,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Nevada

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—7-8-60

No. 16469

United States
Court of Appeals
for the Ninth Circuit

M. M. ZENOFF, COMMERCIAL CREDIT CORPORATION and SOUTHWESTERN PUBLISHING COMPANY, INC., Appellants,

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Transcript of Record

Appeal from the United States District Court
for the District of Nevada

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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For the Appellee. [1]*

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* Page numbers appearing at bottom of page of Original Transcript of Record.

In the United States District Court
For the District of Nevada

In Bankruptcy No. 121

In the Matter of

CHARLES J. KETCHAM, doing business as LAKE MOTORS, and as STUDEBAKER SALES & SERVICE, and as STUDEBAKER-PACKARD SALES AGENCY,
Bankrupt.

PETITION

To: The Honorable Judges of the United States District Court for the District of Nevada:

The Petition of M. M. Zenoff, of the City of Las Vegas, County of Clark, State of Nevada, U. S. Tire Supply, Inc., a Nevada corporation, having its principal place of business in the City of Las Vegas, County of Clark, State of Nevada, and Commercial Credit Corporation, a Maryland corporation, having a place of business in the City of Las Vegas, County of Clark, State of Nevada, respectfully shows:

I.

Charles J. Ketcham, doing business as Lake Motors and as Studebaker Sales & Service, and as Studebaker-Packard Sales Agency, has had his principal place of business within the above judicial district.

II.

Said Charles J. Ketcham owes debts to the amount of $1,000.00 and over, and is not a wage earner or farmer.

III.

Your Petitioners are creditors of the said Charles J. Ketcham, having provable claims against him, fixed as to liability and [2] liquidated as to amount, amount in the aggregate, in excess of the value of securities held by them, to more than $500.00. The nature and amount of your Petitioners' claims are as follows:

(a) M. M. Zenoff, for radio broadcasting services $608.63

(b) U. S. Tire Supply, Inc., for goods, wares, and merchandise sold and delivered $26.25

(c) Commercial Credit Corporation, for moneys loaned to, or guaranteed by, the said Charles J. Ketcham $41,932.25

The claim of Petitioner Commercial Credit Corporation is secured by certain liens including an attachment lien upon certain property of the said Charles J. Ketcham, but the amount of its claim exceeds the value of the security therefor by more than $30,000.00.

IV.

The said Charles J. Ketcham, within four months last past committed an act of Bankruptcy, in that he did heretofore, to-wit, on the 4th day of December, 1956, permit, while insolvent, one of his creditors, namely Young Electric Sign Company,

through legal proceedings, to obtain a lien upon certain of his property, namely, all that certain real property in the County of Clark, State of Nevada, described as follows:

> Lot One Hundred Seventy-Seven (177) in Parcel "E" of Henderson Townsite Annex No. 4, as shown by map thereof on file in Book 3 of Plats, page 41, in the Office of the County Recorder of Clark County, Nevada.
>
> Excepting therefrom the following described portion thereof:
>
> Beginning at the most Northerly corner of said Lot 177; thence South 42°23'00" East a distance of 160.00 feet to a point; thence South 47°37'00" West a distance of 105.99 feet to a point on the East line of Water Street (100 feet wide); thence North 8°51'37" West along said East line a distance of 191.92 feet to the point of beginning.

and has failed to vacate or discharge said lien within thirty days from the date said lien was obtained. And in this behalf your Petitioners represent that in that certain action now pending in [3] the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, numbered in the files of said Court as No. 77103, in which said Young Electric Sign Company is plaintiff and the said Charles J. Ketcham was defendant, a writ of attachment was issued out of and under the seal of said Court, and on the 4th day of December, 1956, was levied upon all of the right, title and interest of the said Charles J. Ketcham in and

to the real property hereinbefore described; and that the lien of said attachment has not been vacated or discharged.

Wherefore, your Petitioners pray that service of this Petition with subpoena may be made upon said Charles J. Ketcham as provided in the Acts of Congress relating to Bankruptcy, and that he may be adjudged by the Court to be a Bankrupt within the purview of such Acts.

/s/ M. M. ZENOFF.

U. S. TIRE SUPPLY, INC.,

/s/ By H. D. DAVIESS,
Its President.

COMMERCIAL CREDIT CORPORATION,

/s/ By DAVID ZENOFF,
Its Attorney.

ZENOFF, MAGLEBY & MANZONIE,

/s/ By DAVID ZENOFF,
Attorneys for Petitioners. [4]

Duly Verified.

[Endorsed]: Filed March 1, 1957.

[Endorsed]: Filed February 10, 1958.

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Las Vegas, Nevada, in said district, on the 1st day of March, 1957.

Whereas a petition was filed in this court, on the 1st day of March, 1957, against Charles J. Ketcham, the alleged bankrupt above named, praying that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy;

It is ordered that the above entitled proceeding be, and it hereby is, referred to John C. Mowbray, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Charles J. Ketcham shall henceforth attend before the said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ ROGER T. FOLEY,
District Judge. [6]

[Endorsed]: Filed March 1, 1957.

[Title of District Court and Cause.]

ANSWER OF ALLEGED BANKRUPT

A Petition having been filed in the above Court on the 1st day of March, 1957, praying that your respondent, the alleged bankrupt above named, be

adjudged a bankrupt, your respondent now appears and answers the said Petition as follows:

1. That respondent is now, and has been, for more than six months prior to March 1, 1957, a resident of and domiciled within the State of California and that his principal place of business has been in the State of California during all of the aforesaid period and that this Court is therefore without jurisdiction.

2. Respondent denies doing business as Lake Motors and as Studebaker Sales & Service, and as Studebaker-Packard Sales Agency, with his principal place of business within the jurisdiction of this judicial district, or elsewhere within six months months prior to March 1, 1957.

3. Respondent admits the allegations contained in Paragraph II of said Petition.

4. Respondent denies that Petitioners have provable claims against him, fixed as to liability and liquidated as to amount, as alleged in Paragraph III of said petition, except [8] Respondent alleges he is indebted to M. M. Zenoff in the sum of $208.30.

5. Respondent denies that he permitted his creditors to obtain a lien, or to permit an attachment thereon of certain of his property while he was then insolvent, as alleged in Paragraph IV of said Petition.

Wherefore, Your Respondent prays that the aforesaid Petition be dismissed for lack of jurisdiction, or in the event it be determined that this

Court has jurisdiction that a hearing may be had on said Petition and this answer, and that the issues presented thereby may be determined by the Court.

/s/ CHARLES J. KETCHAM.

Duly Verified. [9]

[Endorsed]: Filed March 8, 1957.

[Endorsed]: Filed February 10, 1958.

[Title of District Court and Cause.]

PETITION FOR INJUNCTION

The Petition of M. M. Zenoff, U. S. Tire Supply, Inc., and Commercial Credit Corporation respectfully shows:

I.

That they are creditors of Charles J. Ketcham, doing business as Lake Motors, and as Studebaker Sales & Service and Studebaker-Packard Sales Agency, and have filed a Petition in involuntary bankruptcy against said Charles J. Ketcham.

II.

That the said Charles J. Ketcham is the owner of all that certain real property in the County of Clark, State of Nevada, described as follows:

Lot One Hundred Seventy-Seven (177) in Parcel "E" of Henderson Townsite Annex No. 4, as shown

by map thereof on file in Book 3 of Plats, page 41, in the Office of the County Recorder of Clark County, Nevada.

Excepting therefrom the following described portion thereof:

Beginning at the most Northerly corner of said Lot 177; thence South 42°23'00" East a distance of 160.00 feet to a point; thence South 47°37'00" West a distance of 105.99 feet to a point on the [1] East line of Water Street (100 feet wide); thence North 8°51'37" West along said East line a distance of 191.92 feet to the point of beginning.

III.

That said real property is subject to a deed of trust dated October 13, 1955, executed and delivered by the said Charles J. Ketcham and Ima May Ketcham to Pioneer Title Insurance and Trust Company to secure their promissory note in favor of the Bank of Nevada in the original principal sum of $85,000.00 which said deed of trust is recorded in the Office of the County Recorder of the County of Clark, State of Nevada, in Book 70 of Official Records as Instrument No. 59221. By instrument recorded on January 22, 1957, in the Office of the County Recorder of the County of Clark, State of Nevada, in Book 119 of Official Records as Instrument No. 97921, the Bank of Nevada assigned said deed of trust and the obligations thereby secured to James Blankenship.

IV.

Petitioners are informed and believe, and upon such information and belief allege that all of the obligations secured by said deed of trust have been paid except the sum of $25,000.00, plus interest thereon from a date not earlier than July 1, 1956, at the rate of six per cent per annum.

V.

On the 26th day of November, 1956, the beneficiary under said deed of trust caused to be executed and recorded in the Office of the County Recorder of the County of Clark, State of Nevada, as Instrument No. 94168, a notice of breach of the obligation secured by said deed of trust and of its election to cause the property subject to said deed of trust to be sold to satisfy the obligation thereby secured. Petitioners are informed and believe, and upon such information and belief allege that the trustee under said deed of trust, the Pioneer [2] Title Insurance and Trust Company, unless enjoined by this court will proceed to advertise said property at public auction to satisfy the obligation secured by said deed of trust.

VI.

That the fair value of the property subject to said deed of trust exceeds the amount of the obligations secured by said deed of trust by more than $25,000.00, which sum will be available for distribution to the creditors of said Charles J. Ketcham,

if said property is administered in the bankruptcy proceedings and sold in an orderly manner. The value of said property over and above the amount of the obligations secured by said deed of trust will be lost to the creditors of said Charles J. Ketcham if the trustee and beneficiary under said deed of trust are suffered or permitted to sell said property.

Wherefore, petitioners pray that a temporary restraining order issue restraining the trustee and beneficiary under said deed of trust, that they be ordered to show cause why an injunction should not issue enjoining them from selling said property pending the further order of this court, and that upon due notice and hearing such an injunction issue.

ZENOFF, MAGLEBY &
MANZONIE,

/s/ By DAVID ZENOFF,
Attorneys for Petitioner. [3]

Duly Verified.

[Endorsed]: Received and Filed March 13, 1957.

[Title of District Court and Cause.]

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

On consideration of the verified petition of M. M. Zenoff, U. S. Tire Supply Co., Inc., and Commerical Credit Corporation, it appearing (1) that irreparable injury will result to the creditors of Charles J. Ketcham, the alleged bankrupt, unless a temporary restraining order issue restraining Pioneer Title Insurance & Trust Company, and James Blankenship and all persons in active concert or participation with them from selling or causing to be sold under the deed of trust executed by the said Charles J. Ketcham and Ima May Ketcham, his wife, to Pioneer Title Insurance & Trust Company, as trustee to secure a note in favor of Bank of Las Vegas, which deed of trust is recorded in the Office of the County Recorder of Clark County, Nevada, in Book 70 of Official Records as Instrument No. 59221, and which deed of trust, together with the obligation thereby secured was assigned by the said Bank of Las Vegas to said James Blankenship by instrument recorded in the Office of the County Recorder of Clark County, Nevada, in Book 119 of Official Records as Instrument No. 97921;

(2) That said irreparable injury will consist of the loss to the creditors of the said Charles J. Ketcham of the excess amounting to more than $25,000.00 of the value of the property subject to said deed of trust over the amount of the obliga-

tions thereby secured, and that such irreparable injury will result and ensue before this matter enjoining the sale of said property can be heard on notice.

Now, Therefore, It Is Hereby Ordered:

(1) That the said Pioneer Title Insurance and Trust Company and James Blankenship be and appear before the undersigned, Referee in Bankruptcy, at the courtroom of the United [5] States District Court in the United States Court House and Post Office Building, in the City of Las Vegas, Nevada, at the hour of 4:00 o'clock in the afternoon of the 22nd day of March, 1957, then and there to show cause if any they have why they, their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them, should not be enjoined from selling the property subject to the aforesaid deed of trust or causing or permitting the same to be sold to satisfy the obligations thereby secured; and

(2) That pending the hearing and determination of the above and foregoing order to show cause, the said Pioneer Title Insurance and Trust Company and James Blankenship, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them be, and they are hereby, restrained from selling the property subject to the aforesaid deed of trust or causing or permitting the same to be sold to satisfy the obligations thereby secured.

Dated this 13th day of March, 1957.

/s/ JOHN C. MOWBRAY,
Referee in Bankruptcy. [6]

Return on Service Attached. [7]

[Endorsed]: Received and Filed March 13, 1957.

[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL PETITION

To: The Honorable Judges of the United States District Court For the District of Nevada:

The Petition of M. M. Zenoff of the City of Las Vegas, County of Clark, State of Nevada, Commercial Credit Corporation, a Maryland Corporation, having a place of business in the City of Las Vegas, County of Clark, State of Nevada, and Southwestern Publishing Co., Inc., a Nevada corporation, having its principal place of business in the City of Las Vegas, County of Clark, State of Nevada, respectfully shows:

I.

Charles J. Ketcham, doing business as Lake Motors and as Studebaker Sales & Service, and as Studebaker-Packard Sales Agency, has had his principal place of business within the above judicial district.

II.

Said Charles J. Ketcham owes debts to the amount of $1,000.00 and over, and is not a wage earner or farmer.

III.

Your Petitioners are creditors of the said Charles J. Ketcham, having provable claims against him, fixed as to liability [10] and liquidated as to amount, which in the aggregate exceed $500.00 over and above the value of securities held by them. The nature and amount of your petitioners' claims are as follows:

(a)	M. M. Zenoff, for radio broadcasting services	$ 608.63
(b)	Commercial Credit Corporation, for moneys loaned to, or guaranteed by, the said Charles J. Ketcham, In excess of.....	$41,932.25
(c)	Southwestern Publishing Co., Inc., for newspaper advertising	$ 167.25

The claims of Petitioners, M. M. Zenoff and Southwestern Publishing Co., Inc., are unsecured. The claim of Petitioner Commercial Credit Corporation is secured by certain liens, including attachment liens, but the amount of its claim exceeds the value of the security therefor by more than $30,000.00.

IV.

The said Charles J. Ketcham, within four months next preceding the filing of the original Petition herein, committed an act of Bankruptcy, in that he

did heretofore, to-wit, on the 4th day of December, 1956, permit, while insolvent, one of his creditors, namely Young Electric Sign Company, through legal proceedings, to obtain a lien upon certain of his property, namely, all that certain real property in the County of Clark, State of Nevada, described as follows:

> Lot One Hundred Seventy-Seven (177) in Parcel "E" of Henderson Townsite Annex No. 4, as shown by map thereof on file in Book 3 of Plats, page 41, in the Office of the County Recorder of Clark County, Nevada.
> Excepting therefrom the following described portion thereof: [11]
>
> Beginning at the most Northerly corner of said Lot 177; thence South 42°23'00" East a distance of 160.00 feet to a point; thence South 47°37'00" West a distance of 105.99 feet to a point on the East line of Water Street (100 feet wide); thence North 8°51'37" West along said East line a distance of 191.92 feet to the point of beginning.

and has failed to vacate or discharge said lien within thirty days from the date said lien was obtained. And in this behalf your Petitioners represent that in that certain action now pending in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, numbered in the files of said Court as No. 77103, in which said Young Electric Sign Company is plaintiff and the said Charles J. Ketcham was defendant, a writ of attachment was issued out of and under the seal of

said Court, and on the 4th day of December, 1956, was levied upon all of the right, title and interest of the said Charles J. Ketcham in and to the real property hereinbefore described; and that the lien of said attachment was not vacated or discharged prior to the filing of the original petition herein.

Wherefore, Your Petitioners pray that service of this Petition with subpoena may be made upon said Charles J. Ketcham as provided in the Acts of Congress relating to Bankruptcy, and that he may be adjudged by the Court to be a Bankrupt within the purview of such Acts.

M. M. ZENOFF,

/s/ By DAVID ZENOFF,
His Attorney.

COMMERCIAL CREDIT CORPORATION,

/s/ By DAVID ZENOFF,
Its Attorney.

SOUTHWESTERN PUBLISHING CO., INC.,

/s/ By [Illegible],
Vice President. [12]

Duly Verified. [13]

Receipt of Copy Attached. [14]

[Endorsed]: Received and Filed April 15, 1957.

[Endorsed]: Filed February 10, 1958.

[Title of District Court and Cause.]

SECOND AMENDED AND SUPPLEMENTAL PETITION

To: The Honorable Judges of the United States District Court For the District of Nevada:

The Petition of M. M. Zenoff of the City of Las Vegas, County of Clark, State of Nevada, Commercial Credit Corporation, a Maryland Corporation, having a place of business in the City of Las Vegas, County of Clark, State of Nevada, and Southwestern Publishing Co., Inc., a Nevada corporation, having its principal place of business in the City of Las Vegas, County of Clark, State of Nevada, respectfully shows:

I.

Charles J. Ketcham, doing business as Lake Motors, as Studebaker Sales & Service and as Studebaker-Packard Sales Agency, the alleged bankrupt, for the longer portion of the six months next preceding the filing of the original petition resided and had his domicile in San Bernardino, California, within the Southern District of California. Prior thereto the alleged bankrupt had his principal place of business in the County of Clark, State of Nevada within this judicial district. All but a small fraction of the alleged bankrupt's assets are located and almost all of his creditors reside or have their places of business within this judicial district, and the interest of justice and [15] the convenience of the creditors of the alleged bankrupt will be served and promoted by the retention of this proceeding in this judicial district.

II.

Said Charles J. Ketcham owes debts to the amount of $1,000.00 and over, and is not a wage earner or farmer.

III.

Your Petitioners are creditors of the said Charles J. Ketcham, having provable claims against him, fixed as to liability and liquidated as to amount, which in the aggregate exceed $500.00 over and above the value of securities held by them. The nature and amount of your petitioners' claims are as follows:

(a)	M. M. Zenoff, for radio broadcasting services	$ 608.63
(b)	Commercial Credit Corporation, for moneys loaned to, or guaranteed by, the said Charles J. Ketcham, In excess of.....	$41,932.25
(c)	Southwestern Publishing Co., Inc., for newspaper advertising	167.25

The claims of Petitioners, M. M. Zenoff and Southwestern Publishing Co., Inc., are unsecured. The claim of Petitioner Commercial Credit Corporation is secured by certain liens, including attachment liens, but the amount of its claim exceeds the value of the security therefor by more than $30,000.00.

IV.

The said Charles J. Ketcham, within four months next preceding the filing of the original Petition herein, committed an act of Bankruptcy, in that he did heretofore, to-wit, on the 4th day of December,

1956, permit, while insolvent, one of his creditors, namely Young Electric Sign Company, through legal proceedings, to obtain a lien upon certain of his property, [16] namely, all that certain real property in the County of Clark, State of Nevada, described as follows:

> Lot One Hundred Seventy-Seven (177) in Parcel (E" of Henderson Townsite Annex No. 4, as shown by map thereof on file in Book 3 of Plats, Page 41, in the Office of the County Recorder of Clark County, Nevada.
> Excepting therefrom the following described portion thereof:
>
> Beginning at the most Northerly corner of said Lot 177; thence South 42°23'00" East a distance of 160.00 feet to a point; thence South 47°37' 00" West a distance of 105.99 feet to a point on the East line of Water Street (100 feet wide); thence North 8°51'37" West along said East line a distance of 191.92 feet to the point of beginning.

and has failed to vacate or discharge said lien within thirty days from the date said lien was obtained. And in this behalf your Petitioners represent that in that certain action now pending in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, numbered in the files of said Court as No. 77103, in which said Young Electric Sign Company is plaintiff and the said Charles J. Ketcham was defendant, a writ of attachment was issued out of and under the seal of said Court, and on the 4th day of December 1956,

was levied upon all of the right, title and interest of the said Charles J. Ketcham in and to the real property hereinbefore described; and that the lien of said attachment was not vacated or discharged prior to the filing of the original petition herein.

Wherefore, Your Petitioners pray that service of this Petition with subpoena may be made upon said Charles J. Ketcham as provided in the Acts of Congress relating to Bankruptcy, and that he may be adjudged by the Court to be a Bankrupt within the purview of such Acts.

M. M. ZENOFF,
/s/ By DAVID ZENOFF,
His Attorney. [17]

COMMERCIAL CREDIT CORPORATION,
/s/ By DAVID ZENOFF,
Its Attorney.

SOUTHWESTERN PUBLISHING CO., INC.,
/s/ DAVID ZENOFF,
Its Attorney.

Duly Verified. [18]

Acknowledgment of Receipt of Copy Attached. [19]

[Endorsed]: Filed May 3, 1957.

[Endorsed]: Filed February 10, 1958.

[Title of District Court and Cause.]

ORDER

This cause having come on to be heard at Las Vegas, Nevada, before the undersigned, John C. Mowbray, Referee in Bankruptcy, on the 13th day of April, 1957, upon the petition of M. M. Zenoff, Commercial Credit Corporation, a Maryland corporation, and Southwestern Publishing Co., Inc., a Nevada corporation, that Charles J. Ketcham be adjudicated a bankrupt and thereafter an amended and supplemental petition having been filed with the Court and the Court having received evidence and having considered the answer of Charles J. Ketcham filed herein, and upon consideration of the evidence and arguments of counsel, the Court finds that the respondent Charles J. Ketcham, is now and has been for more than six months prior to March 1, 1957, a resident of and domiciled within the State of California, and the Court is, therefore, without jurisdiction. That accordingly, said petition should be dismissed with costs.

Witness the Honorable John C. Mowbray, Referee in Bankruptcy.

Dated this 18th day of June, 1957.

/s/ JOHN C. MOWBRAY,
Referee in Bankruptcy. [20]

[Endorsed]: Received and Filed June 18, 1957. John C. Mowbray, Referee.

[Endorsed]: Filed June 26, 1957. Oliver F. Pratt, Clerk.

[Endorsed]: Filed February 10, 1958. Oliver F. Pratt, Clerk.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO PETITION FOR REVIEW

It Appearing that the petitioning creditors received no notice of any kind of the Order dated June 18, 1957, dismissing the petition and amended and supplemental petitions to adjudicate the above-named Charles J. Ketcham a bankrupt until June 25, 1957, and good cause being made to appear therefor,

It Is Ordered that the time within which the petitioning creditors may petition for a review of said order by the judge be and the same is hereby extended to and including July 6, 1957.

Dated this 5th day of July, 1957.

/s/ JOHN C. MOWBRAY,
Referee in Bankruptcy. [21]

[Endorsed]: Filed July 6, 1957.

[Endorsed]: Filed February 10, 1958.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S ORDER DISMISSING PROCEEDINGS

The petition of M. M. Zenoff, Commercial Credit Corporation, a Maryland Corporation and Southwestern Publishing Co., Inc., a Nevada corporation, respectfully shows

1. That heretofore a petition was filed in the above entitled court praying that Charles J.

Ketcham be adjudicated an involuntary bankrupt; that upon the filing of said petition, an order was duly made and entered by the above entitled court referring said petition and all proceedings herein to John C. Mowbray, Esq., one of the referees in bankruptcy of said court; thereafter the said Charles J. Ketcham filed an answer to said petition, and the above named petitioning creditors filed an amended and supplemental petition; that thereafter to-wit, on the 13th day of April 1957, the matter came on for hearing before the said referee in bankruptcy, the said Charles J. Ketcham and the petitioning creditors appearing by their respective counsel, and oral and documentary evidence was adduced by the respective parties.

2. That on the 18th day of June, 1957, said referee in bankruptcy signed the following order:

"This cause having come on to be heard at Las Vegas, Nevada, before the undersigned, John C. Mowbray, Referee in Bankruptcy, on the 13th day of April, 1957, upon the petition of M. M. Zenoff, Commercial Credit Corporation, [22] a Maryland corporation, and Southwestern Publishing Co., Inc., a Nevada corporation, that Charles J. Ketcham be adjudicated a bankrupt and thereafter an amended and supplemental petition having been filed with the Court and the Court having received evidence and having considered the answer of Charles J. Ketcham filed herein, and upon consideration of the evidence and arguments of counsel, the Court finds that the respondent, Charles J. Ketcham, is now and has been for more than six months prior to March 1, 1957, a resident of and domiciled within

the state of California, and the Court is, therefore, without jurisdiction. That accordingly, said petition should be dismissed with costs.

Witness the Honorable John C. Mowbray, Referee in Bankruptcy.

Dated this 18th day of June, 1957.

/s/ JOHN C. MOWBRAY,
John C. Mowbray,
Referee in Bankruptcy."

3. That said order is erroneous in that regardless of the residence or the domicile or place of business of the said Charles J. Ketcham this court had and has jurisdiction to entertain said petition and to adjudicate said Charles J. Ketcham a bankrupt; that under the provisions of Section 22 of the Bankruptcy Act as amended (11 U.S.C. 55) the above entitled court should either retain jurisdiction of the above entitled proceedings or transfer the same to the United States District Court for the district in which said Charles J. Ketcham resided, was domiciled or had his principal place of business during the greater part of the six months next preceding the filing of said petition, as the interests of parties might require; that the interests of the parties require that the court retain jurisdiction of said proceedings for the reason that substantially all of the assets of said Charles J. [23] Ketcham reside or have their places of business within the territorial jurisdiction of the above entitled court.

4. That the petitioning creditors did not receive notice of any kind of the signing of said order until the 25th day of June, 1957; that the original of said order was not transmitted to the Clerk of the above entitled Court, as required by Section 39 (a) (9) (11 U.S.C. 67 a) (9), or entered by the Clerk upon the Clerk's Bankruptcy Docket, as required gy the first paragraph of General Order No. 1 of The General Orders in Bankruptcy until the 18th day of June 1957; that under the provisions of Section 67 (c) of the Bankruptcy (11 U.S.C. 67 c) the time within which a petition to review the aforesaid order may be filed will not expire until the 6th day of July 1957.

Wherefore, the petitioning creditors pray for a review of the aforesaid Order by the Judge of the above entitled court; that said Order be vacated and set aside; and that said Charles J. Ketcham be adjudicated a bankrupt.

ZENOFF & MAGLEBY,

/s/ By CALVIN C. MAGLEBY,
Attorneys for the Petitioning Creditors. [24]

Duly Verified.

Acknowledgment of Receipt of Copy Attached. [25]

[Endorsed]: Filed July 6, 1957.

[Endorsed]: Filed February 10, 1958.

[Title of District Court and Cause.]

PETITION TO VACATE AND SET ASIDE SALE UNDER DEED OF TRUST

The petition of M. M. Zenoff, Commercial Credit Corporation, a Maryland corporation, and Southwestern Publishing Co., Inc., a Nevada corporation, hereinafter referred to as the petitioning creditors, respectfully shows:

1. That heretofore a petition and amended and supplemental petitions were filed herein by creditors of the above-named Charles J. Ketcham praying that said Charles J. Ketcham be adjudicated an involuntary bankrupt; that upon the filing of the original petition herein the Court duly made and entered a general order of reference referring the proceedings to the Honorable John C. Mowbray, Esq., one of the referees in bankruptcy of the above-entitled court.

2. That at the time of the filing of said petition and amended and supplemental petitions said Charles J. Ketcham was the owner of all that certain real property in the County of Clark, State of Nevada, described as follows:

> Lot One Hundred Seventy-Seven (177) in Parcel "E" of Henderson Townsite Annex No. 4, as shown by map thereof on file in Book 3 of Plats, page 41, in the Office of the County Recorder of Clark County, Nevada.
> Excepting therefrom the following described portion thereof: [26]

Beginning at the most Northerly corner of said Lot 177; thence South 42°23'00" East a distance of 160.00 feet to a point; thence South 47°37' 00" West a distance of 105.99 feet to a point on the East line of Water Street (100 feet wide); thence North 8°51'37" West along said East line a distance of 191.92 feet to the point of beginning.

3. That said real property is subject to a deed of trust dated October 13, 1955, executed and delivered by the said Charles J. Ketcham and Ima May Ketcham to Pioneer Title Insurance and Trust Company to secure their promissory note in favor of the Bank of Nevada in the original principal sum of $85,000.00 which said deed of trust is recorded in the Office of the County Recorder of the County of Clark, State of Nevada, in Book 70 of Official Records as Instrument No. 59221. That by an instrument recorded on January 22, 1957, in the Office of the County Recorder of the County of Clark, State of Nevada, in Book 119 of Official Records as instrument No. 97921, the Bank of Nevada assigned said deed of trust and the obligations thereby secured to James Blankenship.

4. That Petitioners are informed and believe, and upon such information and belief allege that all of the obligations secured by said deed of trust have been paid except the sum of $25,000.00, plus interest thereon from a date not earlier than July 1, 1956, at the rate of six per cent per annum.

5. That value of the above described real property exceeds the total amount of all of the obligations secured by said deed of trust by more than $60,000.00.

6. That the trustee under said deed of trust having threatened to sell the above described real property in exercise of the power of sale contained in said deed of trust for the purpose of satisfying the obligations thereby secured, the petitioning creditors on the 9th day of March 1957 filed herein a petition for an injunction enjoining the trustee and beneficiary under said deed of trust from selling said real property, in order that the equity of said [27] Charles J. Ketcham in said real property might be preserved for the benefit of his creditors; that thereafter the referee in bankruptcy entered a temporary restraining order and order to show cause restraining the trustee and beneficiary under said deed of trust from selling said real property and requiring them to show cause on the 22nd day of March 1957 why the prayer of said petition should not be granted; that by stipulation of counsel for the respective parties the hearing of said petition was continued until the 15th day of April 1957 and said temporary restraining order was continued in effect until that time; that on the 15th day of April 1957 the matter came on for hearing before the referee; that at the conclusion of said hearing said referee ordered that said temporary restraining order should continue in effect pending the further order of the court or referee.

7. That no order vacating said temporary restraining order has ever been made or entered but on the 18th day of June 1957 the referee signed an order dismissing the above entitled proceeding for want of jurisdiction; that the petitioning creditors received no notice of any kind of the signing of said order until the 25th day of June 1957; that the original of said order was not transmitted to the Clerk of the above entitled court as required by Section 37 (a) (9) of the Bankruptcy Act, as amended (11 U.S.C. 67 (a) (9)), or entered by the Clerk on the Clerk's Bankruptcy Docket, as required by General Order No. 1 of the General Orders in Bankruptcy, until the 26th day of June, 1957; that the time within which a petition for a review of said order by the Judge of the above entitled court will not expire until the 6th day of July 1957; that concurrently with the filing of this petition the petitioning creditors are filing a petition for a review of said order by the Judge of the above entitled Court.

8. That on the 2nd day of July 1957 prior to the final determination of the petition for an injunction referred to in [28] Paragraph 6 hereof, and prior to the expiration of the time within which a petition for a review of the referee's order dismissing these proceedings might be filed, the trustee under the aforesaid deed of trust purported, in the exercise of the power of sale therein contained, to sell said real property to the holder of the obligations secured by said deed of trust for the amount of said obligations.

9. That the said Charles J. Ketcham is insolvent; that his equity in said real property constitutes the only substantial asset available for the payment of his creditors; that if the aforesaid sale is not vacated and set aside the creditors of said Charles J. Ketcham will suffer irreparable injury; that said sale is void because made before the final determination of said petition for an injunction.

Wherefore, petitioners pray that said sale be set aside, and the purchaser at said sale and all persons claiming under him be forever enjoined and barred (a) from claiming any right, title or interest in said real property by virtue of said sale; and (b) from claiming any right, title or interest in said real property other than a lien for the payment of the amount of the obligations secured by said deed of trust.

ZENOFF & MAGLEBY,

/s/ By CALVIN C. MAGLEBY,
Attorneys for Petitioners.

HAWKINS & CANNON,

/s/ By HOWARD W. CANNON,
Attorney for Charles J. Ketcham. [29]

Duly Verified. [30]

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed July 6, 1957.

[Title of District Court and Cause.]

ORDER DENYING PRAYER OF PETITION FOR REVIEW, AND PETITION TO VACATE SALE UNDER DEED OF TRUST

The petitioning creditors in the above entitled matter, on the 6th day of July, 1957, filed with the clerk of this Court, at Las Vegas, their "petition for review of referee's order dismissing proceedings," and filed in like manner on the same date their "petition to vacate and set aside sale under deed of trust";

These petitions, for reasons unknown to the Court, were not called to its attention until the Judge returned from vacation, September 3rd, 1957.

On the basis of the record now before the Court, and good cause appearing, it is

Ordered, that the prayer of each of the respective petitions be and they are hereby denied.

Dated at Carson City, Nevada, this 9th day of September, 1957.

/s/ JOHN R. ROSS,
U. S. District Judge. [33]

[Endorsed]: Filed September 9, 1957.

[Title of District Court and Cause.]

MOTION TO VACATE AND SET ASIDE ORDER DENYING PETITION FOR REVIEW AND PETITION TO VACATE SALE UNDER DEED OF TRUST

The petitioning Creditors herein, M. M. Zenoff, Commercial Credit Corporation and Southwestern Publishing Co., Inc., respectfully move the Court to vacate and set aside the Order entered herein on September 9, 1957, entitled "Order Denying Prayer Of Petition For Review and Petition To Vacate Sale Under Deed Of Trust" on the ground that said Order was improvidently made and entered for the following reasons:

(a) The Petitions denied by said Order were not at the time of the entry of said Order properly before the Court for the reason that as of that time the Referee had not made or filed his certificate of the proceedings had before him as required by Section 39 (a) (8) of the Bankruptcy Act (11 U.S.C. 67 (a) (8),) and the Court did not have before it the record necessary to its passing upon said petitions.

(b) The petitioning creditors were afforded no opportunity to be heard in support of said petitions.

Dated this 24th day of September, 1957.

ZENOFF & MAGLEBY,

/s/ By DAVID ZENOFF,

Attorneys for Petitioners. [34]

Notice of Motion

To: Charles J. Ketcham, Bankrupt, and Hawkins & Cannon, His Attorneys; James Blankenship, and Goldwater & Singleton, His Attorneys.

You, and Each of You, Will Please Take Notice that the undersigned will bring the above and foregoing Motion To Vacate and Set Aside Order Denying Petition For Review and Petition To Vacate Sale Under Deed Of Trust on for hearing before this Honorable Court at 10:00 A.M. on the 2nd day of October, 1957, or as soon thereafter as counsel may be heard.

Dated this 24th day of September, 1957.

ZENOFF & MAGLEBY,

/s/ By DAVID ZENOFF,
Attorney for Petitioners.

Acknowledgment of Receipt of Copy Attached. [35]

[Endorsed]: Filed September 25, 1957.

[Title of District Court and Cause.]

ORDER ON MOTION TO VACATE AND SET ASIDE ORDER DENYING PETITION FOR REVIEW AND PETITION TO VACATE SALE UNDER DEED OF TRUST

Petitioners' motion to vacate and set aside order denying petition for review and petition to vacate

sale under deed of trust came on to be heard this 8th day of October, 1957, petitioners being represented by Calvin C. Magleby, and no other interested parties appearing in person or by counsel, and the motion being argued, was submitted to the Court for its ruling; and it appearing to the Court that the provisions of Section 39 (a)(8) had not been complied with in that there was not now before this Court the referee's certificate on petition for review; that petitioners could not comply with said section until such time as the Referee did file such certificate; that the facts as now presented to the Court indicate that petitioners should not be prejudiced because of the failure of the Referee to file such certificate; and to that end the order entered by the Court on the 9th day of September, 1957, should be amended; now, therefore, it is

Ordered, that the order of this Court made and entered on the 9th day of September, 1957, be and it is hereby amended and modified as follows: That the paragraph of said [36] order reading

> "Ordered, that the prayer of each of the respective petitions be and they are hereby denied"

be stricken, and that in lieu thereof the following paragraph be inserted:

> "Ordered, that each of said petitions be, and they are hereby, dismissed without prejudice, it appearing that the Court has no jurisdiction to hear the matters presented in the petitions at this time."

Dated at Las Vegas, Nevada, this 8th day of October, 1957.

/s/ JOHN R. ROSS,
U. S. District Judge. [37]

[Endorsed]: Filed October 22, 1957.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW

I, John C. Mowbray, one of the referee's in bankruptcy of the above entitled court, do hereby certify as follows:

1. On the 1st day of March, 1957, the petitioning creditors, M. M. Zenoff, U.S. Tire Supply, Inc., and Commercial Credit Corporation, filed their petition to have Charles J. Ketcham adjudged an involuntary bankrupt.

2. Upon the filing of said petition a general order of reference was made, referring the proceedings to me.

3. On the 8th day of March, 1957, the said Charles J. Ketcham filed his answer to said petition challenging the jurisdiction of this court on the ground that he had neither a residence nor a place of business within this District during the greater

part of the six months next preceding the filing of said petition. Thereafter, M. M. Zenoff, Commercial Credit Corporation and Southwestern Publishing Company, Inc. as petitioning creditors, filed an Amended and Supplemental Petition and a Second Amended and Supplemental Petition, admitting that the said Charles J. Ketcham had neither a residence nor place of business within this District during the greater part of the Six months next preceding the filing of the petition, but alleging that the great majority [38] of the creditors of the said Charles J. Ketcham either resided or had places of business within this District and all, or substantially all of the assets of the said Charles J. Ketcham were located within this District, and praying that jurisdiction of the proceedings be retained in the interest of justice, pursuant to Section 22 (b) of the Bankruptcy Act, as amended by the Act approved July 7, 1952 C. 579, 66 Stat. 424 (11 U.S.C.A. Supp. Sec. 55 b).

4. A hearing on said Petition, Amended and Supplemental Petition, and Second Amended and Supplemental Petition, and the answer of said Charles J. Ketcham was held before me on the 15th day of April, 1957, and oral and documentary evidence was adduced.

5. Upon the hearing of said Petition, Amended and Supplemental Petition, Second Amended and Supplemental Petition and answer, the following question was presented:

Whether, in view of the fact that said Charles J. Ketcham had neither a residence or place of residence within this District during the greater part of the six months next preceding the filing of the original petition this court had jurisdiction of the proceeding and might retain jurisdiction thereof in the interest of justice where substantially all of the bankrupt's assets were located within this District, and the greater number of the alleged bankrupt's creditors either resided or had their places of business within this District.

6. Upon consideration of the law and the evidence, I made an order dismissing the proceedings for want of jurisdiction.

7. The foregoing order was signed by me and filed in my office on the 18th day of June, 1957, and in compliance with [39] Section 29 (a) (9) of the Bankruptcy Act, was transmitted to and filed in the Office of the Clerk of this Court on the 26th day of June, 1957.

8. Thereafter I made an order extending the time within which the said M. M. Zenoff, Commercial Credit Corporation and Southwestern Publishing Company, Inc. might petition for a review of said order to and including the 6th day of July, 1957.

9. Thereafter, to wit on the 6th day of July, 1957, said M. M. Zenoff, Commercial Credit Corporation and Southwestern Publishing Company, Inc. filed herein their Petition for a Review of said order.

10. On the 9th day of August, 1957, I made and filed herein my Findings of Fact and Conclusions of Law.

11. I have heretofore transmitted to the Clerk of this Court and there is now on file in his office

(a) The original Petition to adjudicate the said Charles J. Ketcham an involuntary bankrupt

(b) The Amended Supplemental Petition to adjudicate the said Charles J. Ketcham a bankrupt

(c) The Second and Supplemental Petition to Adjudicate said Charles J. Ketcham an involuntary bankrupt

(d) The Answer of said Charles J. Ketcham

(e) The transcript of the evidence taken before me, and all exhibits introduced in evidence

(f) The order dismissing the proceedings

(g) The order extending the time for filing a petition for review

(h) The petition for review

(i) My findings of fact and conclusions of law

Dated this 30th day of January, 1958.

/s/ JOHN C. MOWBRAY,
Referee in Bankruptcy. [41]

[Endorsed]: Filed February 10, 1958.

In the United States District Court
For the District of Nevada

In Bankruptcy No. 121

In the Matter of

CHARLES J. KETCHAM, dba Lake Motors, and Studebaker Sales, and Service; and as Studebaker-Packard Sales Agency,

Alleged Bankrupt.

ORDER DISMISSING PROCEEDINGS

This matter is a masterpiece of confusion. As it now stands little can be accomplished by a lengthy dissertation of what should have been done, so the Court will confine its remarks to a brief statement of what has taken place, the Court's rulings, and the reasons therefor.

On March 1, 1957, petitioners filed their petition in bankruptcy seeking the adjudication of one Charles J. Ketcham, an involuntary bankrupt. Thereafter a first and supplemental petition and a second amended and supplemental petition were filed. The alleged bankrupt filed an answer. An order was entered by the Referee restraining the Pioneer Title Company from selling certain real property belonging to the alleged bankrupt in which the Title Company was named as Trustee with power of sale in the deed of trust.

Ultimately the Referee heard and determined the issues joined on the petitions and the answer, and on the 18th day of June, 1957, dismissed the peti-

tions, a portion of that [45] order reading as follows:

> The Court finds that the respondent, Charles J. Ketcham, is now and has been for more than six months prior to March 1, 1957, a resident of and domiciled within the state of California, and the Court is, therefore, without jurisdiction. That accordingly, said petition should be dismissed with costs.

Accordingly the petitions were dismissed. It nowhere appears that the petitioners on this 18th day of June, 1957, or at any subsequent time to and including the date of the sale of the alleged bankrupt's property under the power of sale contained in the trust deed, which was on July 2, 1957, made any application, to Judge or Referee, for a protective order staying the sale of the property pending a hearing on petition of review from the Referee's order of June 18, 1957, dismissing the petitions.

Section 39(c) of the Bankruptcy Act relating to petitions for review of the Referee's orders, recites in part:

> * * * Upon application (for review) of any party in interest, the execution or enforcement of the order complained of may be suspended by the Court upon such terms as will protect the rights of all parties in interest.

At the time of the entry of the Referee's order dismissing the petitions petitioners knew, or should have known, that any and all orders theretofor entered in said proceedings would, and did, fall. And yet they saw fit to stand by and do nothing to the

end that the sale of the trust deed property be delayed until after the review of [46] the Referee's order had been disposed of.

The record indicates that the Title Company sold the property on July 2, 1957. As we see the matter the Title Company was under no restraint at that time. No doubt it was aware of the dismissal of the petitions by the Referee, and was advised by its counsel that it could safely proceed with the sale, as well it might.

On July 6, 1957, petitioners filed their petition for review. It appears to have been filed with the clerk of this Court in the first instance, rather than with the Referee. On this point Section 39(c) reads:

> A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. (Emphasis supplied)

This Court is of the present opinion that the petitioners did not comply with the requirement that the petition for review be filed with the Referee, in which event the matter of review was never properly before this Court. But here is where, so far as the Court is concerned, utter confusion begins. But, to give petitioners the benefit of the doubt, the Court will assume that the petition for review was properly filed with the Referee in the first instance.

In any event, the Referee's certificate on review was not filed in this Court until January 30, 1958. So, when the hearing on (1) the petition for review, and [47] (2) petition to set aside sale came on for hearing and ruling by the Court on September 9, 1957, the Court then, and properly, we think, entered its order denying the prayer of each of said petitions. Petitioners then filed their motion to vacate and set aside the order of this court entered September 9, 1957, and pursuant to that motion the Court, on October 8, 1957, amended its September 9 order to read as follows:

> Ordered, that each of said petitions be, and they are hereby, dismissed without prejudice, it appearing that the Court has no jurisdiction to hear the matters presented in the petitions at this time.

This order was based on the fact that (1) the petition for review had not been filed in the first instance with the Referee, but with the Court instead, and, (2) upon the further ground that there was not then before the Court the Referee's certificate on review. Until the certificate has been filed with its accompanying papers there is no record upon which the Court can pass.

We heard nothing more of this matter until February 10, 1958, when there was filed with the clerk of this Court the Referee's certificate on review together with attached documents as required by Section 39(a)(8). It is to be noted here that even though the two petitions hereinabove referred to were dismissed without prejudice by the Court's

order of October 8, 1957, no further petition has been filed in this matter. In short, petitioners have done nothing more than ask that the corpse of their original petition for review be exhumed and revivified. As we see the situation life once being extinct we should let it rest in peace. [48]

In any event the matter has again come upon our calendar, and it is indicated that the matter of a further hearing on the petition to review has been set for May 4, 1959, at which time this Court will again be sitting at Las Vegas. This last continuance was entered by the Court to the end that "all interested" parties might appear, or at least file their points and authorities, in support or opposition to the petition to review. Our order of January 23, 1959, contained the following:

> Further Ordered, that a copy of this order be forthwith served by the Clerk upon the interested parties herein mentioned to the end that they may, within fifteen days from the date hereof, file their authorities in support of whatever position they desire to take (1) in connection with the petition for review, and (2) the petition to vacate sale.

Evidently as the result of the clerk's notice counsel for the alleged bankrupt, Ketcham, filed their memorandum in support of the Referee's order dismissing the original petitions. The fifteen day period having elapsed and no other memos having been filed, the Court is of the opinion that since its present ruling will be based solely upon the record before us and the applicable provisions of the

Bankruptcy Act, there is no need for delaying until May 4 to enter its order herein. This is particularly true inasmuch as nothing further can be presented by way of proof, and any oral argument would be futile in the face of the record.

Based upon the foregoing statement of fact, and accompanying comment, the Court concludes as a matter of [49] law that as to the petition for review there is nothing now before the Court, the original petition having been dismissed on October 8, 1957, and no further or other proceedings having been taken on the part of the petitioners. This disposes of the matter.

We dismiss the proceedings so far as they relate to the petition to vacate sale for the same reason, and if it was properly before us now we should have to rule against petitioners in any event because of their own failure to seek, and obtain, a protective order pending their attempted review.

In dismissing all of these proceedings, as we propose now to do, the Court is not unmindful that there may be, without now identifying them, certain legal questions lurking in the background. However, in view of the record before us we do not reach them at this time.

Now that this case has been once again disposed of, re-interred so to speak, may its bones rest now in tranquil repose. To counsel, pax vobiscum. It is, therefore,

Ordered, that all proceedings now pending in this matter be, and they are hereby, dismissed with prejudice.

Dated at Carson City, Nevada, this 26th day of February, 1959.

/s/ JOHN R. ROSS,
U. S. District Judge. [50]

[Endorsed]: Filed February 26, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

M. M. Zenoff, Commercial Credit Corporation and Southwestern Publishing Company, Inc., the petitioning creditors in the above-entitled cause hereby appeal to the United States Court of Appeals for the Ninth Circuit on the order of the above-entitled Court entitled "Order Dismissing Proceedings" filed February 26, 1959, a notice of the entry of which was made in the bankruptcy docket of the above-entitled court on the 3rd day of March, 1959, and service of which was made by mail on the same day.

Dated this 3rd day of April, 1959.

/s/ CALVIN C. MAGLEBY,
Attorney for Appellants. [52]

[Endorsed]: Filed April 3, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents, listed in the attached index, are true and correct copies of the originals on file in this office, or true and correct copies of orders entered in the minutes or dockets of this court, in the above-entitled case, and that they constitute the record on appeal as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 29th day of April A.D. 1959.

[Seal] OLIVER F. PRATT,
Clerk,

/s/ By RAY MONA SMITH,
Deputy Clerk. [55]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents listed in the attached index, together with the documents listed in the attached Supplemental Index, are the originals filed in this court, or true and correct cop-

ies of orders entered on the minutes or dockets of this court, in the above entitled case and that they constitute the record and supplemental record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 6th day of January, 1960.

[Seal] OLIVER F. PRATT,
Clerk,

/s/ By FRANCES BULLOCH,
Deputy. [9]

In the District Court of the United States
In and For the District of Nevada

No. 121 LV

In the Matter of

CHARLES J. KETCHAM, dba Lake Motors and Studebaker Sales and Service; and as Studebaker Car Sales and Supplies, Bankrupt.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered that the above-entitled matter came on regularly for hearing before the United States District Court, District of Nevada, Las Vegas, Nevada, on Monday, the 15th day of April, A.D. 1957, before Hon. John C. Mowbray, Referee in Bankruptcy, with the following proceedings had:

Referee: This is the time set for the matter of Charles J. Ketcham, doing business as Lake Motors and as Studebaker Sales and Service, and as Studebaker Packard Sales and Service, Bankrupt. In Bankruptcy No. 121. This is the time set for the trial on the Petition [1]* of M. M. Zenoff, of the City of Las Vegas, County of Clark, State of Nevada, U. S. Tire Supply, Inc., a Nevada Corporation, and Commercial Credit Corporation, a Maryland Corporation, having a place of business in Las Vegas, Nevada, praying that Charles J. Ketcham be adjudged by this Court to be a bankrupt within the purview of the Bankruptcy Act.

The record should show that Charles J. Ketcham filed an Answer to the Petition on March 8, 1957, in these proceedings. The petition of the Petitioning Creditors recites, in substance, that Ketcham has been doing business as Lake Motors and as Studebaker Sales and Service, and as Studebaker-Packard Sales and Service rather, Sales Agency, and has his principal place of business within the jurisdiction of this Court. That Charles J. Ketcham owes debts in the amount of one thousand dollars or over, and is now a wage earner or farmer, that the Petitioning Creditors of Charles J. Ketcham have claims against him, as to liabilities, unliquidated, in the amount in the aggregate in excess of the values of the securities held by them, to be more than five hundred dollars, that the claim of Peti-

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* Page numbers appearing at bottom of page of Original Transcript of Record.

tioner Commercial Credit Corporation is secured by certain liens, includes an attachment lien upon certain property of Ketcham but the amounts claimed exceed the value of the securities; that Mr. Ketcham, within four [2] months last past committed an act of bankruptcy, to-wit, on the Fourth day of December, 1956, he did permit one of these creditors, namely, Young Electric Sign Company, new legal proceedings, to obtain a lien upon certain of his properties, namely, all of that real property in the County of Clark, described in the Petition, and has failed to discharge or vacate said lien within thirty days of the date of said lien. And the Petitioning Creditors hereby claim that that certain action now pending in the Eighth Judicial District Court, being No. 77,103, in which Young Electric Sign Company is the Plaintiff, and Charles J. Ketcham, is the Defendant, that a Writ of Attachment was issued on the fourth day of December, 1956, and was levied upon all the right, title and interest of Charles J. Ketcham in and to the real property described in paragraph four. That the Writ of Attachment has not been vacated or discharged. And the Petition alleges—rather, the Bankrupt in his Answer alleges that he is now and has been for more than six months prior to March 1, 1957, a resident of and domiciled in the State of California, that his principal place of business has been in the state of California. He denies, in paragraph two, of doing business as Lake Motors and as Studebaker Sales and Service, and as Studebaker-Packard Sales Agency, here, or elsewhere

within this District, within the six months prior to March 1, 1957. He admits [3] all the allegations of paragraph two. The alleged bankrupt denies that the petitioning creditors have provable claims against him fixed as to liabilities, unliquidated, as to the amounts as alleged in paragraph three, that they are excessive. The respondent alleges to be indebted to M. M. Zenoff—and so on. Now, will you state your appearances for the record, please?

Mr. Zenoff: David Zenoff, of Zenoff and Magleby, for the Petitioning Creditor, Commercial Credit.

Mr. Cannon: Howard W. Cannon, of Hawkins and Cannon, for Charles J. Ketcham. If your Honor please, by way of information, I might point out to the Court that on April thirteenth there was an Amended and Supplemental Petition served on us in this matter. Now, I presume it was probably filed on the same day. Mine doesn't have the filing date. Of course, we do not as yet have an Answer to file to that Amended and Supplemental Petition, and I believe the issue should be clarified as to whether we are to proceed on the basis of the Amended and Supplemental Petition, or on the basis of the original Petition. If we are to go on ahead on the Amended Petition, I, of course, do not have an Answer on file, and would naturally request time to examine that matter, and place an Answer on file prior to litigating the matters therein. I merely submit that to the Court so that the Court might have all of the information before [4] it.

Referee: The record should show that Mr. Zenoff has just handed me the original of that Amended and Supplemental Petition that you—to which you have just referred. Do you want to file it?

Mr. Zenoff: Yes. This is the first opportunity we have had to do so, and I might augment Mr. Cannon's remarks, that the Petition is changed from the original Petition in only one respect, that we allege a credit for one of the creditors, as different than in the original Petition. After the filing of the original Petition we were advised there was probably—that there was a probability that one of the Petitioners had been paid. The U. S. Royal Tire Company. We do not know, even at this point, when they were paid. Whether it was before or after the filing of the Petition. However, the—all the Supplemental Petition does, which was filed, merely sets forth a different creditor, replacing U. S. Royal Tire Company.

Referee: Well, gentlemen, *who* are we going to proceed? You have got a Petition on file. You have an Answer, and we are at issue. Now, the Court has just been handed, for filing, an Amended and Supplemental Petition. There is nothing in the record except Mr. Cannon's statement that it has been served on them. When was it served? [5]

Mr. Zenoff: Last Saturday, the 13th.

Referee: The 13th. And now he has had no opportunity to Answer this Petition, so we are not at issue.

Mr. Zenoff: It is perfectly agreeable that a continuance to this matter be granted. There is only so far one important issue that should come before the Court today. That is the proof of testimony I would like to bring out, that there is a valuable asset existing in Clark County, owned by the alleged bankrupt. There is a foreclosure pending on that asset. It consists of a piece of property in the city of Henderson of great value, against which there is an encumbrance of approximately twenty-four thousand dollars. The testimony and proof would bring out that the minimum value of that property would be seventy-five thousand dollars and more. There will be an objection on the part of Mr. David Goldwater, who will appear on behalf of the foreclosing party to try to dissolve the restraining order that this court has issued. We seek to preserve that asset for the benefit of the—either the creditors — if our allegations in the petition are proved, or to give the alleged bankrupt an opportunity to liquidate his creditors by realizing the full value of that asset.

Referee: Well, let's direct our attention [6] first to the petition and the answer. What are your feelings on this matter, Mr. Cannon?

Mr. Cannon: Well, your Honor, if your Honor please, based on Mr. Zenoff's statement, if it is a fact that the only additional problem at this time is that there is one creditor added here, we would be willing to proceed, if the Court so desires, on the basis of if something develops insofar as that creditor is concerned that we may not be able to an-

swer, we might have to have a continuance on that point. In the alternative, we have no objection to a continuance to a later date, but we likewise agree that an order should be placed in effect to protect us as well as protect the other creditors, if there is to be a continuance for some extended time in the future. Now, we have and are prepared at this time to litigate the essential items here at this time, one, whether or not the Court has jurisdiction over this alleged bankrupt at all, and secondly, whether or not he was in fact insolvent. Because, if either of those questions are answered, one, that he is not a resident and was not within the preceding six months, or, that he is not insolvent, then in either of those events, of course, that would end the procedure.

Referee: Well, I would rather have these points cleared before we proceed. The only question is this, you see, if the Court determines that this [7] gentleman is not a bankrupt, I have no authority to continue that order against Mr. Goldwater's creditors, you see. And I think the law is to the effect that under Section Eleven—"a suit which was brought * * * until his question of discharge is determined by the court having a hearing." But, here he has a lien.

Mr. Goldwater: In the event the Pioneer Title Insurance and Trust Company, who are the trustees under a deed of trust, James Blankenship, who is the assignee of it, or the beneficiary under the deed of trust, or, I should say, the possessor for value——

Referee: How long a continuance would be necessary to file an answer on this matter?

Mr. Zenoff: Could I consult with Mr. Cannon a moment or two?

(Off record.)

Mr. Cannon: If your Honor please, I am just informed that the date of the supposed foreclosure sale is tomorrow morning. Now, if that is a fact, we certainly would prefer to proceed at this time and take our chances on it, whether or not we would be required to file an additional answer, to litigate the main issues, unless the Court would feel that it could and would issue a further order. If an order is to be issued, then we have no objection to going along on a continuance so that we might examine this petition and see whether an answer is [8] required.

Referee: Well, your answer filed in these proceedings is in response. Mr. Zenoff has represented to the Court that the amended and supplemental petition varies only in the fact that the Southwestern Publishing Company, Inc., is substituted for U. S. Tire Supply, Inc. Is that correct?

Mr. Zenoff: That is correct.

Referee: Well, in the answer, in paragraph four, the respondent denies the petitioners claim as to liability as to alleged—as to the alleged claim in paragraph three of said petition, that he is indebted to M. M. Zenoff in the sum of two hundred eight dollars and thirty cents — well, are you indebted to Southwestern Publishing Company, Inc.?

Are you able to plead at this time regarding that matter?

Mr. Cannon: Your Honor, may we have just a moment, here?

(Off record.)

Mr. Cannon: Your Honor, we would admit that we are indebted to the Southwestern Publishing Company, Inc., in the sum of one hundred sixty-seven dollars and twenty-five cents.

Referee: Well, then, would it be agreeable to counsel that the answer of the alleged bankrupt to the original petition may be considered as the [9] answer of the bankrupt to the amended and supplemental petition, except as to paragraph four, which should be amended to contain or to consist of, after the conclusion of the said paragraph, the following words: 'and Southwestern Publishing Company, Inc., in the sum of one hundred sixty-seven dollars and twenty-five cents'—is that agreeable?

Mr. Zenoff: No objection. Satisfactory with me.

Mr. Cannon: That is satisfactory, your Honor.

Referee: Well, then, that will be the order and we will proceed, then, on the supplemental and amended petition, and the answer of the alleged bankrupt to same, as just stipulated to by the counsel for both parties.

Mr. Zenoff: Mr. Ketcham, I would like to call you adversely. Please take the stand over there.

CHARLES J. KETCHAM

having been first duly sworn, called as a witness on behalf of petitioner adversely, took the stand and testified as follows: [10]

Direct Examination

Q. (By David Zenoff): Will you please state your full name?

A. Charles Joshua Ketcham.

Q. Are you familiar with the entity of Lake Motors? A. Yes.

Q. What were — what was the relationship of Lake Motors to yourself, if any?

A. Well, solely owned proprietorship.

Q. And are you familiar with the Studebaker Sales and Service?

A. No. Well, that isn't the name style.

Q. What was the name style in which you did business in Las Vegas, Nevada?

A. Charles J. Ketcham, authorized dealer, Studebaker-Packard.

Q. And where did you operate such a business, Mr. Ketcham?

A. Seventeenth and Fremont. 1620 East Fremont.

Q. That is in Las Vegas, Nevada? [11]

A. Yes.

Q. For what period of time, Mr. Ketcham?

A. April 10, 1952 until November 15, 1955.

Q. And were you in that period of time residing in Las Vegas, Nevada? A. I was.

(Testimony of Charles J. Ketcham.)

Q. Now, in the operation of that business, Mr. Ketcham, did you incur certain obligations to business creditors? A. I did.

Q. I show you a typed list of creditors and ask you if substantially that is the list of creditors to which you are now obligated by reason of the operation of your Studebaker agency in Las Vegas, Nevada? A. Yes, it is.

Q. I would like to have this marked for identification. And I move that Exhibit One be introduced into evidence, your Honor.

Referee: Any objections?

Mr. Cannon: No objections.

Referee: Then Petitioner's Exhibit No. 1 will be so admitted as Petitioners Exhibit No. 1.

Mr. Zenoff: Mr. Ketcham, [12] during the course of the operation of your Studebaker Sales Agency, did you have occasion to do business so to speak with the Commercial Credit Corporation?

A. I did.

Q. What was the relationship of the Commercial Credit Corporation to the operation of your business? A. They purchased paper from me.

Q. Do you recall whether or not there were any signed agreements executed by yourself to the Commercial Credit Corporation with respect to guarantees? A. Yes.

Q. And is it your testimony that you did so execute a guarantee contract with the Commercial Credit Corporation? A. Yes.

(Testimony of Charles J. Ketcham.)

Q. Now, explain, if you will, and briefly, if possible, the nature of such a contract that you executed.

A. I purchased, or I negotiated contracts between potential automobile purchasers and myself, which were sold to Commercial Credit Corporation.

Q. Those conditional sales contracts were sold by you to Commercial Credit, is that right?

A. Yes, they purchased them. [13]

Q. And to which you guaranteed each conditional sales contract. Is that correct?

A. Yes. Conditionally they were guaranteed.

Q. Now, in the event that one or more of those conditional sales contracts fell into default, what would be your liability under those contracts?

A. Upon notice to pay off the remaining balance and take possession of the collateral.

Q. Now, did you, in fact, or were you, in fact, called upon by Commercial Credit Corporation, to honor the guarantee executed by you to them?

A. Not after November fifteenth.

Q. Of what year? A. 1955.

Q. Well, prior to November 15, 1955, were there obligations incurred by you to Commercial Credit Corporation, by reason of your guaranteed contract? A. Yes.

Q. Do you know how much that obligation is at this time?

A. No, I haven't any idea what it is at this time.

(Testimony of Charles J. Ketcham.)

Q. Well, do you know it to be in excess of one thousand dollars? [14] A. Yes.

Q. Do you know it to be in excess of twenty-five thousand dollars? A. No.

Q. Do you know it to be in excess of twenty thousand dollars? A. No.

Q. Well, will you tell the Court, to the best of your recollection, the amount that you feel that you now are obligated to Commercial Credit for?

A. All I know is that it would be reasonable for me to assume it was in excess of one thousand dollars. How much beyond that I haven't any idea.

Q. Now, Mr. Ketcham, what are your assets in Clark County, Nevada?

A. A piece of property located in Henderson, Nevada.

Q. Is that real property?

A. That is real property.

Q. What is your estimate of the value of that property?

A. Probably around eighty-five thousand dollars at today's market value.

Q. What did this property consist of? [15]

A. A new car building, automobile building, and land, improved.

Q. And what other assets, if any, do you own in Clark County, Nevada?

A. Stock in Twin Lakes Shopping Center, Inc., one hundred eighty-seven and a half shares, I believe. Stock in Sky Haven Airport, Incorporated, approximately twenty-two percent of the outstand-

(Testimony of Charles J. Ketcham.)

ing stock. Various oil and gas leases in the County of Clark. A portable office building located at Seventeenth and Fremont known as C and H Motors. A lease deposit and leasehold assets on the same location as the portable office building. Reserve accounts in the Bank of Nevada and in the First National Bank of Las Vegas, in the aggregate sum of approximately ten thousand dollars.

Q. As to the encumbrances existing against the property in Henderson, Nevada—tell the Court, if you will, the nature of those encumbrances?

A. It is a first trust deed originally obtained by the Bank of Las Vegas on that property.

Q. What is the balance existing now, if you know?

A. Well, interest and principal, and various charges, make the aggregate sum close to twenty-five thousand dollars.

Q. Now, as additional security, is it [16] not a fact, Mr. Ketcham, that the bank, or its assignee, holds the stock in the Twin Lakes Shopping Center? A. Yes, that is true.

Q. Does it have any other security of the assets which you have set forth? A. No.

Q. That is the only asset?

A. That is all.

Q. Now, Mr. Ketcham, in the original petition we have alleged that you owed the U. S. Royal a certain sum of money. A. Yes.

Q. Has that debt been paid?

A. Yes, it has.

(Testimony of Charles J. Ketcham.)

Q. Do you recall when it was paid?

A. Yes, I have it in my briefcase. I don't remember the exact date.

Q. Well, do you recall whether it was before or after the filing of the petition?

A. I believe it was on the same date or the day after; it was very close to that time. It was after the petition was filed.

Q. I see. You are aware, are you not, Mr. Ketcham, that there is a foreclosure pending, instituted by the Bank of Las Vegas, or its assignees, as to the deed of trust to which you have testified? [17]

A. Yes, I am aware of that.

Q. And you are informed that the foreclosure sale is set for April the 16, 1957, is that correct?

A. Yes.

Q. Now, where are your other assets, if any, Mr. Ketcham, and of what do they consist?

A. I have an automobile, a personal car, and a home, in California. Those are the only other assets.

Q. What is the value of your home in California?

A. Oh, about eighty-five hundred.

Q. Eighty-five hundred, you say?

A. Yes.

Q. Are you speaking of net equity value?

A. No, that is the gross value of it, and it is offset by a mortgage of approximately seventy-eight hundred.

(Testimony of Charles J. Ketcham.)

Q. Now, the list of creditors that I have submitted to you, and which is marked Plaintiff's Exhibit 1, does that list reflect most, or all, of your creditors?

A. No, the list you showed me reflects only the small creditors. [18]

Q. Where do the bulk of the creditors on the list that I submitted to you, reside or do business?

A. In Nevada.

Q. And this represents the smaller creditors. You say that you have some larger creditors, too?

A. I have other claimants, yes.

Q. And where do they reside or do business?

A. Well, they have branches here.

Q. Here in Las Vegas, Nevada? A. Yes.

Q. Where do you call your residence now, Mr. Ketcham?

A. 3432 LeRoy Street, San Bernardino, California.

Q. How long have you resided there?

A. Since December the 7th, 1955.

Q. Where did you reside before you went to San Bernardino?

A. 1235 South Ninth Street, Las Vegas, Nevada.

Q. Are you familiar, Mr. Ketcham, with a claim of the Young Electric Sign Company against yourself? [19] A. I am.

Q. Are you, or were you aware of the fact that the Young Electric Sign Company commenced proceedings against you and levied a writ of attachment? A. I am.

(Testimony of Charles J. Ketcham.)

Q. And did you ever take steps to release that writ of attachment in the courts of Las Vegas?

A. Not in the courts, no.

Q. Nothing further, Mr. Ketcham, at this time.

Referee: Mr. Ketcham, just a question I would like to ask you here. In December of last year, 1956, can you tell me at this time what were your outstanding obligations?

A. Well, the ones which I acknowledge as being debts consist of approximately ninety-five thousand dollars.

Referee: And can you tell me what would be an approximation of your assets at that time?

A. Approximately one hundred twenty-five thousand.

Referee: Could you state to the Court at that time, whether, on or about December 4, 1956, or there abouts, if your property were sold, all of [20] it, at a fair valuation, would that have been sufficient to pay your debts of ninety-five thousand?

A. Yes.

Referee: Could it have been sold at that time?

A. That I don't know. I hadn't been in the picture long enough at that time to have made an answer.

Referee: Well, why did you default in this trust deed?

A. I didn't default. It was in a divorce settlement that it was awarded or was surrendered to my ex-spouse, and she defaulted in that interim, and it was subsequently re-assigned to me to con-

(Testimony of Charles J. Ketcham.)

tinue the liquidation and satisfy the creditors. That was in December of 1956.

Referee: Nothing further.

Mr. *Ketcham:* I would like to re-examine Mr. Ketcham.

Redirect Examination

Q. (By David Zenoff): Mr. Ketcham, you stated your liabilities were ninety-five thousand. Of those, are you including Commercial Credit Corporation for one thousand? [21]

A. No. An arbitrary amount in excess of one thousand.

Q. And do you feel that when you gave the Court the figure of ninety-five thousand, that that included all that you would owe the Commercial Credit Corporation? A. Yes.

Q. And when you stated to the clerk that your assets had a value of one hundred twenty-five thousand, were those the assets to which you have already testified? Or rather, when you stated to the Court? A. Yes.

Referee: Then, that is your equity in those assets?

A. Well, let's say that is the assets as opposed to liabilities.

Referee: If you were to liquidate those assets, it is your statement to the Court that you would end up with one hundred twenty-five thousand dollars, approximately?

(Testimony of Charles J. Ketcham.)

A. Right. Then the proceeds would be used to pay off the ninety-five thousand.

Q. (By Mr. Zenoff): Well, Mr. Ketcham, you made an effort to sell the Henderson property, didn't you? [22] A. Yes.

Q. Have you ever had a concrete offer on that property?

A. Not a concrete offer, no.

Q. Nobody has submitted actual cash money to you, is that correct? A. No.

Q. You have tried on many occasions to sell this property, have you?

A. Yes, and I was hampered by the proceedings that were in effect.

Q. Well, you say proceedings—there were several going on on?

A. Well, by all of them.

Mr. Zenoff: Nothing further of this witness.

Referee: I just asked that question, Mr. Zenoff, because of your petition. You allege that he was insolvent at the time that he permitted the attachment to be attached to his property. And subparagraph nineteen, section one, says, the bankruptcy act, defines insolvency, and says: "a person wherein the aggregate of his property * * * not be sufficient in amount to pay his debts."

Mr. Zenoff: That is correct.

Referee: All right. That is all. [23]

(Witness Ketcham excused.)

BASIL HILLIS

having been first duly sworn, called as a witness on behalf of petitioner, took the stand and testified as follows:

Direct Examination

Q. (By David Zenoff): Would you state your name, please? A. Basil Hillis.

Q. And what is your occupation?

A. I am manager and business district representative for Commercial Credit Corporation in Las Vegas.

Q. How long have you occupied that position?

A. I have been with the company since 1935. I have been up here since the War, since 1946, in that capacity.

Q. In that capacity have you handled the business negotiations and transactions between Commercial Credit Corporation and Charles J. Ketcham?

A. I have. [24]

Q. And did you at all times maintain personal supervision of that account? A. I did.

Q. And are you familiar now with the condition of that particular account with Commercial Credit Corporation? A. I am.

Q. And what is that particular condition at this time?

A. In connection with the amount owing Commercial Credit?

Q. Yes.

(Testimony of Basil Hillis.)

A. I have figures as of eleven-thirty Saturday of an amount of forty-nine thousand, nine hundred fifty-one dollars and fifty cents.

Q. How was that figure arrived at, Mr. Hillis?

A. In the agreement between Commercial Credit Corporation and Charles J. Ketcham, those contracts in default normally are returnable to the dealer, and the balance or the payoff collected from him, after the account closed. We had no dealer to whom we could return the cars. We obtained bids, sold them for a high bid. The difference between the sale of the automobile and our balance, was charged off. These are the accumulated charge-offs. [25]

Q. And therefore the figure you have just testified to is the net loss figure to Commercial Credit Corporation, after liquidating the repossessed automobile and applying the proceeds to the Ketcham account. Is that true?

A. That is correct. Yes, sir.

Mr. Zenoff: Nothing further of this witness.

Cross Examination

Q. (By Howard W. Cannon): Mr. Hillis, in that sum of forty-nine thousand, nine hundred fifty-one dollars and fifty cents, how much of that is represented by attorneys' fees?

A. That I do not know without checking back, sir.

Q. Well, you have attorneys' fees computed in there, have you not?

(Testimony of Basil Hillis.)

A. I believe that one check has been drawn to the attorneys.

Q. And in a very substantial amount?

A. I believe in the neighborhood of five hundred, if I am not mistaken. [26]

Q. And this is the only item that represents attorneys' fees? A. That is.

Q. How much of that represents charges in connection with repossessions?

A. That I would not know.

Q. Well, is it a very substantial amount?

A. I wouldn't think so.

Q. Now, did you, in accordance with the terms of your contract, ever submit *to* automobiles to Mr. Ketcham within the ninety-day period, after default? A. That I cannot say.

Q. Well, now, you know, as a matter of fact, whether you did or didn't notify Mr. Ketcham within ninety days, do you not, Mr. Hillis?

A. I mean, it was discussed on a many occasions, sir, when Mr. Ketcham was in my office. At one time it was suggested, I believe, that some of the cars be turned over to Mr. Ketcham for liquidation. Nothing ever happened to that.

Q. Do you have a copy of your contract with Mr. Ketcham?

A. I think my attorney has, sir.

Q. Mr. Hillis, I hand you what has been handed to me by your counsel, three sheets, purportedly the [27] agreement to which you have testified. Is that

(Testimony of Basil Hillis.)

the agreement that you entered into with Mr. Ketcham?

A. This is a copy of the agreement.

Q. And the two additional sheets, are they likewise a part of the agreement? A. Yes.

Q. May I have this marked for identification? Counsel, may I offer it at this time? We offer that at this time.

Mr. Zenoff: No objections.

Referee: All right, then, this certain agreement, or copy of an agreement, entitled Reserve Agreement, dated April 17, 1952, between Charles J. Ketcham and Commercial Credit Corporation, will be admitted as the alleged Bankrupt's Exhibit A.

Q. (By Mr. Cannon): Now, Mr. Hillis, you are aware of a provision in the agreement whereby Mr. Ketcham should be notified within ninety days after default, are you not?

A. I believe it states so.

Q. And may I ask whether or not you did notify Mr. Ketcham of the defaults in these particular transactions within ninety days after the default occurred?

A. Not to my knowledge, sir, in writing. [28]

Q. And you have no written documents that would evidence a notification given to Mr. Ketcham? A. Not to my knowledge.

Q. And there is presently on file a lawsuit wherein your company and Mr. Ketcham are litigating the amounts due under the so-called reserve agreement? A. That is right.

(Testimony of Basil Hillis.)

Q. And that matter has not been disposed of?

A. No, sir.

Q. And now, Mr. Hillis, how were these cars actually sold by your company?

A. When we were advised to take possession of the cars, or for down payment of the conditional sales contract, we would obtain three bids, and dispose of the cars to the highest of the three bidders. We retained our folders or records and we were—our accounts—were audited by Mr. Ketcham's representatives some months ago.

Q. Now, were those bids you obtained from used car dealers, or were they from individuals?

A. See, we are not in the retail business at all. They were from used car dealers.

Q. In other words, you made no attempt to sell the automobiles on the open market?

A. No. [29]

Q. You are aware of the period of time when Mr. Ketcham went out of business? A. Yes.

Q. At that time how much of a reserve did Mr. Ketcham have on credit with your company?

A. I don't know, offhand.

Q. Well, isn't it a fact that it was in excess of one hundred thousand dollars?

A. I would say so.

Q. And do you understand then that your company used up all of the one hundred thousand dollars reserve, and thereafter sustained a loss of forty-nine thousand, nine hundred fifty-one dollars and fifty cents? A. In addition to.

(Testimony of Basil Hillis.)

Q. In addition to? In excess of one hundred thousand dollars? A. That is right.

Q. Over what period of time, Mr. Hillis, did you use up that reserve?

A. About a year and a half, approximately. Pretty close.

Q. When you say a year and a half, that refers to the one hundred thousand reserve, or in excess of one hundred thousand, and also the forty-nine thousand accumulation? [30]

A. That is right.

Q. And is it your contention that any person other than yourself or any representative of your company gave Mr. Ketcham notice within the ninety-day period of default as required in your agreement with him? I refer to a notice in writing.

A. I didn't personally, sir, and to the best of my knowledge no one else did.

Q. Nothing further.

Redirect Examination

Q. (By David Zenoff): Mr. Hillis, did the Commercial Credit Corporation have a license to sell automobiles at retail in the state of Nevada?

A. No, we do not.

Q. And in addition to Mr. Ketcham's account, you have other used dealer accounts in Las Vegas, Nevada? A. Yes, we do.

Q. Now, have you had any conversations with Mr. Ketcham, either before or after the filing of this petition in bankruptcy concerning the indebted-

(Testimony of Basil Hillis.)

ness owed by Mr. Ketcham to Commercial Credit?

A. When was the bankruptcy filed, sir? [31]

The Referee: The petition was filed on March 1, 1957, two thirty-five p.m.

A. Not since March of 1957, no, sir. This is the first time I have seen Mr. Ketcham for several months.

Q. (By Mr. Zenoff): Had you had conversations with Mr. Ketcham concerning this indebtedness prior to the filing of the bankruptcy?

A. Yes, sir.

Q. Where did the conversations take place?

A. At my office.

Q. Do you have—did you have one conversation or more than one conversation?

A. More than one.

Q. Do you recall any one particular item regarding the amount owing by Mr. Ketcham to Commercial Credit Corporation?

A. Not particularly, no sir, not any one particular item.

Q. Well, where did your conversations take place? In your office? A. Yes.

Q. Who was present?

A. Myself and Mr. Ketcham.

Q. What did Mr. Ketcham say to you in [32] —with respect to the obligation then to the Commercial Credit Corporation?

Mr. Cannon: Objected to as too indefinite as to the time and place.

(Testimony of Basil Hillis.)

Referee: Will you fix the time and place, Mr. Hillis?

A. No, I cannot, exactly, sir.

Referee: Approximately, sir?

A. 1956.

Referee: Could you fix it any better than that?

A. Not for sure, no, sir.

Mr. Zenoff: Well, can you remember whether or not Mr. Ketcham was still in business operating the Studebaker Sales?

A. No, Mr. Ketcham was not in business at that time at all.

Q. And how long, if you remember, approximately, had he been out of business, when you first discussed the Commercial Credit Corporation's obligations?

A. Probably four or five months, sir.

Q. And did you ever have any conversations with Mr. Ketcham subsequent to that first conversation? [33] A. Yes, I had.

Q. And about how long after the first conversation, was this?

A. Oh, possibly a month or maybe six weeks.

Q. Did you ever have any conversations after that? A. Yes, I had.

Q. And relating to time, about when did you have such conversations?

A. In the Fall of last year.

Q. In the Fall of 1956?

A. In the Fall of 1956.

(Testimony of Basil Hillis.)

Q. Did you ever have a conversation with Mr. Ketcham subsequent to that conversation?

A. Well, I don't believe I have seen Mr. Ketcham since before Christmas.

Q. Well, then, relating to that conversation you made in the Fall of 1956, where did that conversation take place? A. At my office.

Q. And who was present?

A. Mr. Ketcham and myself.

Q. And what was said by Mr. Ketcham to you regarding the obligation of Mr. Ketcham to the Commercial Credit Corporation? [34]

A. He acknowledged the obligation and assured me that Commercial Credit Corporation would not take a loss.

Q. And did he acknowledge the obligation to any particular amount?

A. I believe the amount was discussed at that time as to what it was, but the exact amount I don't know.

Q. Well, can you give the Court, to the best of your recollection, the approximate figure?

A. Approximately in the neighborhood of twenty-five thousand dollars.

Q. Do you recall that it was discussed in that amount, or the approximate figure?

A. Yes. As I remember it, sir, each time that I saw Mr. Ketcham we would discuss the losses. After all, my records were available to Mr. Ketcham.

Mr. Zenoff: Nothing further of Mr. Hillis.

Referee: Well, if you say you discussed a loss

(Testimony of Basil Hillis.)

of approximately twenty-five thousand dollars, in all of these conversations, why has the loss suddenly jumped to forty-nine thousand, nine hundred fifty-one dollars and fifty cents?

A. Losses since that time. [35]

Referee: If I recall your testimony, I may be in error on this, you testified you had a conference with the alleged bankrupt just before Christmas in your office?

A. Well, I haven't seen Mr. Ketcham since just before Christmas. I don't know just when it was.

Referee: You saw him in the Fall of last year?

A. Yes, in the Fall of last year. I would say October or November.

Referee: And at that time you discussed the obligation?

A. Yes, that is right. The condition of the account.

Referee: At that time it was fixed at approximately twenty-five thousand?

A. I think twenty-five thousand. Maybe thirty thousand.

Referee: That's all. I have nothing further.

Recross Examination

Q. (By Howard W. Cannon): Do I understand, then, according to [36] your testimony, the difference, in excess of twenty-five thousand dollars, has occurred since October or November of 1956?

A. I think that is right, sir.

Mr. Cannon: Nothing further.

(Witness Hillis excused.)

FRANKLIN T. MORRELL

having been first duly sworn, called as a witness on behalf of the petitioner, took the stand and testified as follows:

Direct Examination

Q. (By David Zenoff): Would you state your name, please?

A. Franklin T. Morrell.

Q. And what is your occupation?

A. Real estate broker.

Q. Where are you located?

A. 42 Water Street, Henderson, Nevada.

Q. How long have you been a real estate [37] broker in Henderson, Nevada?

A. Four years.

Q. Are you familiar with property values in Henderson, Nevada? A. Yes, sir.

Q. And are you familiar with the property of Mr. Ketcham's? A. I am.

Q. What is your opinion as to the market value of that property?

A. I believe a fair market value of that property would be about seventy-eight thousand dollars.

Q. You, in fact, have been the agent with whom the property has been listed for sale, is that correct, Mr. Morrell?

A. I have been working on it, not from the point of view of an exclusive, but I have been approached by Mr. Ketcham, and am working on it, on an open listing, yes.

(Testimony of Franklin T. Morrell.)

Q. Now, how long ago has it been since you first started to work on the sale of that particular property?

A. That goes back prior to the time that Mr. Ketcham reacquired the property. I was working on it during the time when Mrs. Ketcham at that time owned the property. [38]

Q. Have you at any time since you first started working on it been able to produce a ready sale, one that could be consummated by the payment of cash down, or by note, or otherwise? A. No.

Mr. Zenoff: Nothing further.

Cross Examination

Q. (By Howard W. Cannon): Mr. Morrell, why weren't you able to produce a ready purchaser?

A. Well, at that time the price, the asking price, was much higher than what any figure that has been mentioned here today was, and I assume for that reason, why, I was unable to do that.

Q. Was that also by reason of the fact that there was litigation pending involving the property?

A. Not to my knowledge. It really had never reached that point of discussion.

Q. What was the original asking price on that property?

A. Oh, it ranged from one hundred forty to [39] one hundred eighty thousand.

Q. Now, you state that in your opinion the fair market value is seventy-eight thousand now?

(Testimony of Franklin T. Morrell.)

A. That is correct.

Q. Is it your opinion that the fair market value would be substantially that same amount as of December of 1956? A. I do.

Q. And isn't it a fact, Mr. Morrell, that in 1955, at the time that Mr. Ketcham terminated business out there, properties were substantially higher in value at that time?

A. That is correct, yes.

Q. How did you arrive at that particular figure of seventy-eight thousand dollars?

A. Somewhat on the basis of comparative values. From the original parcel, there was a portion sold off, on the tip, there. I would value the building approximately fifty-five thousand, and the remaining land about twenty-three thousand.

Q. How big a parcel of land is there?

A. It was originally triangular in shape. One side being two hundred thirty-eight foot, by two hundred thirty feet, by approximately two hundred feet. And on the other side, then, another two hundred feet.

Q. Well, acre-wise, what does it contain? [40]

A. Well, just in estimations here, I would say just slightly over an acre. Just in guessing here, an acre being two hundred and six foot square.

Q. And did you take into consideration that it fronts on two very important thoroughfares in Henderson? A. I did.

Q. Did you determine a front-foot figure based on that?

(Testimony of Franklin T. Morrell.)

A. I figured it on a basis of approximately a hundred feet, or a hundred dollars a foot, which is higher than what anything else is selling for at the present time. However, it does have a little more depth than comparable properties.

Q. And you figured a hundred dollars a front-foot on which frontage?

A. It would be off of the highway frontage. Everyone must remember that from the blacktop strip to the streetline, which his property abuts, is one hundred twenty-seven feet, and from that to the edge of the property, is another fifty-feet, with controlled access to it. It doesn't really have one hundred percent highway access.

Q. And your figure of the valuation, then, actually is only seventy thousand dollars different than Mr. Ketcham's, is that correct? [41]

A. Approximately seven thousand dollars, not seventy.

Mr. Cannon: That is all.

Referee: May he be excused.?

(Witness Morrell excused.)

Mr. Zenoff: As my last witness I would like to recall Mr. Ketcham for a question or two.

Mr. Cannon: Frankly, I don't think that—there is certainly no showing of residence here so far. He has already testified to that.

Mr. Zenoff: I am just going to call him as a short witness.

CHARLES J. KETCHAM

having been previously duly sworn, resumed the stand in behalf of the Claimant, and testified further as follows:

Redirect Examination

Q. (By David Zenoff): Mr. Ketcham, you have testified, in answer to the Court, that you figured your assets to be [42] worth one hundred twenty-five thousand dollars? A. Yes.

Q. Would you mind itemizing them, and the valuation you place on each?

A. Yes. Eighty-five thousand dollars on the Henderson property. Seventy thousand dollars on the Twin Lake Shopping Center property. Eight thousand dollars on the Sky Haven Airport.

Q. What does that consist of, stock or land?

A. Stock in a corporation owning the land and the buildings. Approximately six thousand dollars on Seventeenth and Fremont, in leasehold deposits in the building. The Twin Lakes Shopping Center stock, it is seventeen acres that are free and clear over there and I value the acreage at approximately four thousand dollars an acre.

Referee: You own seventeen acres?

A. There is seventeen acres, and it is free and clear. And twenty-five percent of the stock is represented by one hundred eighty-seven and a half shares.

Mr. Zenoff: You own one-fourth of what you place at a valuation of seventy thousand dollars?

(Testimony of Charles J. Ketcham.)

A. That is correct.

Referee: And that is over and above this shopping center? A. No, that is it.

Mr. Zenoff: That is the same?

A. Right. And the balance is made up then in oil and gas leases.

Referee: What is the value of this Twin Lakes Shopping Center investment, fifteen thousand dollars, or——

A. Well, I have called it fifteen thousand dollars, as a net, after costs and et cetera.

Referee: That is your share, fifteen thousand dollars? A. Yes.

Referee: And what are the oil and gas leases that you have?

A. It represents approximately twenty-eight hundred acres.

Referee: What do you think they are worth?

A. Well, I just paid another fifty cents an acre on them for about the third time. I would say somewhere in the neighborhood of three thousand or four thousand dollars. [44]

Mr. Zenoff: Mr. Ketcham, as to the three or four thousand dollars in oil and gas leases. Is that what you paid for them? A. Yes.

Q. Well, how would you get a return on that? Is there oil and gas?

A. Well, we have had numerous offers to sell them.

Q. But there is no oil or gas being developed there now?

(Testimony of Charles J. Ketcham.)

A. No. There wasn't when I bought them.

Q. As to the Twin Lakes Shopping Center stock. The corporation of which you own one-fourth—owned some realty—is that what you testified to?

A. Yes, that is right, uh huh.

Q. And how much have you invested in that stock?

A. Just offhand I couldn't say. I have invested one-fourth of whatever has been invested out there.

Q. Well, now, you testified to the Court that the whole value of the realty would be around sixteen or seventeen thousand dollars, of which you had one-fourth?

A. No, I said there were seventeen [45] acres, approximately, worth four thousand dollars an acre.

Q. Oh, I see. I am sorry. And the Sky Haven Airport, you testified the value of your interest there was eight thousand? A. Uh-huh.

Q. And what is that?

A. That is actually investment.

Q. You have got eight thousand dollars in it?

A. Yes.

Q. And is this a corporation? A. Yes.

Q. And the corporation operates it?

A. No, the corporation doesn't operate it, they own the airport and the facilities.

Q. And does the corporation then lease to the operators? A. Yes.

Q. How much is the rental on that lease?

A. I don't know.

(Testimony of Charles J. Ketcham.)

Q. Have you gotten any return from it?

A. No.

Q. How long have you owned it? [46]

A. Since about 1954 or '53.

Q. Have you gotten any return from the Twin Lakes Shopping Center stock?

A. Not from the stock. It was in notes that the corporation owed me that have been paid off.

Q. Now, Mr. Ketcham, have you had demands made upon you by the creditors that are attached to this list that I had admitted into evidence here?

A. Yes, I had claims made, uh huh.

Q. And you have been unable to pay those claims?

A. Well, the small creditors constitute approximately all of the undisputed claims, and I have been paying them off. Most of the other claims that are filed as attachments on the real property, are disputed claims.

Mr. Zenoff: I have nothing further, your Honor.

Recross Examination

Q. (By Howard W. Cannon): Mr. Ketcham, how many of those small claims would you say you have paid off in the last year?

A. About six thousand dollars worth of [47] them.

Q. And you have continued to pay those creditors over a period of time, is that right?

A. Yes, uh huh.

(Testimony of Charles J. Ketcham.)

Referee: Do you have any lawsuits pending against you, other than this lawsuit that the Commercial Credit has brought?

A. Yes, there are several.

Referee: Based on these claims?

A. No, the claimants—there are very few of the small creditors—I don't know just exactly how many, but there are in the minority. Probably a half a dozen of the small creditors have started litigation to collect. However, Young Electric Sign has started litigation, which is disputed. Howard E. Wingo, which is acknowledged, and has an attachment. The State sales tax, which has a claim, which is acknowledged, and there has been an attachment. Those constitute about the only lawsuits pending.

Referee: Anything further?

Mr. Zenoff: Nothing further, your Honor.

Referee: All right, Mr. Ketcham, that is all. [48]

(Case presented on behalf of Alleged Bankrupt.)

Mr. Cannon: I will call Mr. Ketcham.

CHARLES J. KETCHAM

having been previously duly sworn, called as a witness in behalf of Alleged Bankrupt, testified as follows:

Direct Examination

Q. (By Howard W. Cannon): Do you have any tax liens filed against you?

(Testimony of Charles J. Ketcham.)

A. Yes, I have the one sales tax.

Mr. Zenoff: That is the only one?

A. That is the only one. Now, you say claims?

Mr. Zenoff: Claims, yes.

A. I have a tax claim, Federal Income Tax Claim, for finance reserves, which you are referring to, which are retained in reserve, and which has been offset by the two hundred nine thousand dollar loss taken in 1956, so that any claim that is outstanding in regard [49] to income tax is offset by the loss.

Mr. Cannon: Isn't it a fact also that, according to your accountants, you will have a substantial refund from the income tax?

A. Yes, that is right.

Q. That will increase your assets by whatever that refund will be?

A. Yes, that is correct.

Mr. Cannon: Nothing further.

Mr. Zenoff: I have nothing further, your Honor.

Referee: Is your matter submitted, Mr. Zenoff?

Mr. Zenoff: Yes, your Honor.

Referee: And you, Mr. Cannon?

Mr. Cannon: I think it has all been submitted, now. Everything is in the record, as far as I am concerned.

Mr. Zenoff: If your Honor please, I believe that I could present the gist of this argument very briefly. I think, if the Court will go through each allegation of the petition, that substantially all of them are beyond doubt. There is a jurisdictional

point as to residence, and I take this opportunity to call [50] to the Court's attention the jurisdictional requirements of the bankruptcy act as amended.

Now, originally—in fact, your Honor I'll take the time now to—while I am talking—to supply the court with points and authorities on that particular point. Originally, jurisdiction as to residence was as to the one word, meaning jurisdictional. But, subsequent to the original act the amendment provides now, in effect, that it is now a matter of venue and not jurisdiction. And the Court can take cognizance of the location of the alleged bankrupt's assets and the residence of the creditors, so that as a matter of convenience, the Court may or will take jurisdiction over the matter, whereas it ordinarily, or in the event of a change of residence, may transfer the cause to a jurisdiction where assets and creditors are located. All of that is contained on pages one, two and three, of the memorandum that has just been submitted to the Court.

I feel, in all other respects, that the allegation of this petition has been established, to-wit, that even on Mr. Ketcham's own testimony, substantiated by the testimony of others, his assets did not total one hundred twenty-five thousand dollars, and we are in serious jeopardy here, not only the claimant whom I represent, but all the other creditors that are in the record, and if this foreclosure were allowed to go through [51] tomorrow, that my client and all of these creditors will be virtually wiped out.

There is a substantial asset out in Henderson. What the value of the stock in the Twin Lakes Shopping Center might be I don't know, and I don't believe probably Mr. Ketcham could know. On this Federal Income Tax refund, that is too abstract. We don't really know what the property in Henderson will bring, but we have had the testimony of a real estate man here, and I feel in the interest of all parties concerned, and even the good faith shown by the witness here, Mr. Ketcham on the stand, shows that the witness or rather the bankrupt, wants to take care of these creditors, I feel in fairness to all parties concerned that the bankruptcy should be allowed, and that a stay order be granted holding off the foreclosure, and with the hope and thought, and with the attempt on the part of all of us concerned, to get a liquidation of the property so that the creditors, all of the creditors, can be benefited, perhaps also Mr. Ketcham.

Referee: Mr. Cannon?

Mr. Cannon: Well, I submit to the Court that certainly the residential requirements have not been proven here. The act requires that the alleged bankrupt must have resided or conducted his business within the district for the preceding six months, and the [52] only waiver of that requirement is that he must have conducted that business for the major portion of that six months' period within the district.

Now, there isn't anything before the Court here to show that Mr. Ketcham conducted any business whatsoever in this jurisdiction within the six

month's period prior to the filing of this petition, and in truth and in fact, his last business was conducted in November of 1955, at the time that the business was terminated here.

Now, as to the insolvency, even if we use the petitioner's figures here, certainly Mr. Ketcham is not insolvent under the definition of the act, because there is nothing to show that his debts amount to more than ninety-five thousand dollars, which was his own testimony. And certainly there is nothing—the only dispute as to what his assets might consist of is his valuation of eighty-five thousand dollars on the property in Henderson, as compared to Mr. Morrell's testimony, that in his opinion the fair market value was seventy-eight thousand dollars. Mr. Morrell did testify that at the previous time and place of course the valuation would have been higher. So, we only have a discrepancy of seven thousand dollars. If we were to assume that is correct, and Mr. Ketcham is wrong in that respect, still we do not have a situation of a case coming within [53] that insolvency, as defined under the act.

So, on the two points raised, I submit to the Court, that the petition should be denied.

Now, if the Court feels that there is a basis for the petition, and that the matter should be transferred as suggested by Mr. Zenoff, then we certainly feel that an Order should be placed in effect preserving these assets, and prohibiting the sale, which is supposedly to take place tomorrow, because that is the substantial asset belonging to Mr. Ketcham,

and it must be protected for the benefit of the creditors. And if a bankruptcy, or further hearing is to be had, it is possible that we might elect to attempt to come in under Chapter XI, because it is Mr. Ketcham's desire first to protect all of these creditors. If he came in here voluntarily and took over these obligations which had been assigned to the wife in the divorce proceedings, and which he testified and he resubmitted himself to this jurisdiction and took over the property in an attempt to try to bring the thing out of it, and pay off these creditors, certainly we don't want the actions of any third party to interfere or to in any way jeopardize that attempt on Mr. Ketcham's part.

Mr. Zenoff: That is correct, your Honor. If—it must be borne in mind that the essential [54] point of the petition is not the question of residence. First, we must determine whether or not the proof brought out on the examination sets forth or convinces the Court that the man was insolvent.

Now, on the figures presented by Mr. Ketcham, he testified that of this ninety-five thousand dollars, he has taken into consideration Commercial Credit which he has previously testified to was around a thousand dollars, or in excess of a thousand dollars. I do not need to remind the Court, but taking his figure of ninety-five thousand, and his statement of assets being one hundred twenty-five thousand dollars, and this testimony of Mr. Hillis—assuming then that upon the basis of the record that it is correct, and that the Court then finds that Mr. Ketcham was insolvent, then we go to this question

of residence, because, as I have outlined to the Court before, it is simply contained in section two of the bankruptcy act as amended, in subsection c, that the judge may transfer any case under this title to a court of bankruptcy in any other district regardless of the location of the principal assets of the bankrupt or the principal place of business, if the interest of the parties will be best served by such transfer.

That particular clause is a catchall, that they can encompass the previous restriction, where the question of residence was jurisdictional. But, if any [55] Court in the Federal system found the man insolvent, and it happened to be filed in the wrong court, it could be transferred or retained. It is no longer jurisdictional, your Honor.

Referee: Well, this matter will stand submitted, and the Temporary Stay Order will stand in full force and effect until the Petition is determined. Were we to hear the matter of the Temporary Restraining Order at this time? The returnable date of that restraining order was March 22, 1957. Was it not continued, by stipulation of counsel, until this time and place?

Mr. Goldwater: The Hearing was continued, yes.

Referee: Then are you willing to further continue this matter, pending the decision on the Petition of the Creditors at this point, or do you want to go ahead and be heard on your Order to Show Cause?

Mr. Goldwater: We will submit it.

Referee: Then the Order will remain in full force and effect, pending a further Order in these proceedings.

We will be in recess until two o'clock at which time we will take up the Aqua Hotel [56] matter.

(Recess taken at 11:45 a.m.) [57]

[Endorsed]: Filed February 10, 1958.

[Endorsed]: No. 16469. United States Court of Appeals for the Ninth Circuit. M. M. Zenoff, Commercial Credit Corporation and Southwestern Publishing Company, Inc., Appellants, vs. Charles J. Ketcham, doing business as Lake Motors and Studebaker Sales and Service and Studebaker-Packard Sales Agency, Appellee. Transcript of the Record. Appeal from the United States District Court for the District of Nevada.

Filed: May 1, 1959.

Docketed: May 15, 1959.

Supplemental Filed: January 8, 1960.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 16469

M. M. ZENOFF, COMMERCIAL CREDIT CORPORATION, and SOUTHWESTERN PUBLISHING CO., INC., Appellants,

vs.

CHARLES J. KETCHAM, Appellee.

STATEMENT OF POINTS ON WHICH APPELLANTS WILL RELY

The following are the points on which Appellants will rely on this appeal:

1. The Referee erred in dismissing the proceedings for want of jurisdiction.

2. The Court erred in denying Appellants' petition to vacate and set aside the sale under the deed of trust.

3. The Court erred in refusing to pass upon Appellants' petition for review on its merits.

4. The Court erred in making and entering the order dated February 26, 1959.

CALVIN C. MAGLEBY,
/s/ CALVIN C. MAGLEBY,
Attorney for Appellants.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed November 27, 1959. Paul P. O'Brien, Clerk.

No. 16,481

IN THE

United States Court of Appeals

For the Ninth Circuit

EVIS MANUFACTURING COMPANY, a corporation,
ARTHUR N. WELLS,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITIONERS' OPENING BRIEF.

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No. 16,481

IN THE

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EVIS MANUFACTURING COMPANY, a corporation,
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FEDERAL TRADE COMMISSION,
Respondent.

PETITIONERS' OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is a proceeding to review an order of the Federal Trade Commission directing petitioners to cease and desist from making certain representations in connection with the offering for sale, sale and distribution of a product known as the Evis Water Conditioner. The order was issued on March 23, 1959 (R. I, 804-805). It was served on petitioners on April 2, 1959 (R. VII, 2). The petition for review was filed on May 29, 1959. Petitioners are Evis Manufacturing Company and Arthur N. Wells, a vice president of that company. Both petitioners are residents of, and carry on business in, this Circuit (R. II, 404, 472). They made the representations complained of within this Circuit (R. II, 404-407, 413). This Court has jurisdiction under section 5(c) of the Federal Trade Commission Act as amended (15 U.S.C. 45(c)).

DESCRIPTION OF THE RECORD.

Pursuant to the order of this Court (dated July 17, 1959) the record is unprinted. It consists of seven volumes and twelve physical exhibits. There are two numbering systems: Volumes I and VI are consecutively numbered from page 1 through page 1163. These volumes contain the pleadings, motions, briefs, decisions, notices and correspondence, and the documentary and photographic exhibits. Volumes II through V are consecutively numbered from page 1 through page 3994. These volumes contain the transcript of testimony and other oral proceedings. Volume VII contains the docket sheets of the proceeding. In this brief, references to the record will be by volume and page, e.g., page 1 of Volume I will be cited "R. I, 1"; page 1 of Volume II will be cited "R. II, 1." The Commission's exhibits were identified as "CX"; the exhibits of petitioners (respondents below) were identified as "RX." References to physical exhibits will include the identification number assigned by the Hearing Examiner, the page of the record where the exhibit is identified and the number assigned by the Commission in certifying the record to this Court. For example, Commission's Exhibit No. 4 (copper tubings used in an experiment) will be referred to as "CX 4, R. VI, 823; 2-1/6168-1." Appendix A to this brief contains a list of all exhibits with references to the pages of the record where each is found, and also where each was identified, offered and received, as required by Rule 18(2)f of the Rules of this Court.

STATEMENT OF THE CASE.

A. Summary of the proceedings below.

This proceeding was brought in 1954 by the Federal Trade Commission to enjoin alleged misrepresentations in connection with the sale of a water conditioning unit invented by petitioner Wells and manufactured and sold by petitioner Evis Manufacturing Company (R. I, 1). Hearings commenced on May 12, 1954, and ended four years later, in April, 1958. The testimony of 124 witnesses was taken in Los Angeles, San Francisco and Fresno, California; Pullman, Tacoma and Seattle, Washington; Portland, Oregon; Cleveland, Ohio; Washington, D.C.; Dallas, Texas; and Charlottesville, Virginia. Sixty-eight exhibits were introduced. The transcript comprises 4,000 pages.

Twice the Hearing Examiner, who heard the witnesses and judged their credibility, held that the Commission had failed to sustain the allegations of the complaint (R. I, 512, 692). Twice the Commission reversed. It held on the first appeal that further evidence should be taken (R. I, 654); on the second, that the findings of the Hearing Examiner should be disregarded and a cease and desist order should issue (R. I, 797-817). This petition for review followed.

B. The facts.

Prior to 1952 petitioner Wells, after many years of experimentation (R. II, 416), invented a specially processed metal casting, resembling cast iron, designed to be fitted into water systems for the purpose of beneficially affecting water in homes and in industrial and

agricultural installations.[1] The inventor claims that the unit has an influence on water, in the nature of a catalytic action, which changes the physical behavior of the water so as to produce the represented beneficial results (R. II, 415, 429). A patent was applied for and the application for a patent is still being processed in the Patent Office (R. I, 413-414). Under the procedures of that Office, the file is sealed and its disclosures will not be made public unless and until a patent issues.

The unit was made of specially processed metal with inclusions not ordinarily present in cast iron (R. I, 422, 425-426). While the complaint charged that it was false to represent that the unit was made of a specially processed metal, both the Hearing Examiner and the Commission held that this charge had not been sustained (R. I, 698, 802). The Commission's own witnesses, after spectrographic and photomicrographic analyses, testified that the metal was specially processed and contained inclusions not ordinarily found in cast iron (R. II, 93, 479, 929, 942).

In 1952 petitioner Evis Manufacturing Company was organized to manufacture and market the unit (R. II, 412). The venture was an immediate success. Sales in 1953, the first full year of operation, were approximately $1,250,000 (R. I, 333). All units were sold with a money back guarantee (R. IV, 2916, 3148; and see for example, CX 33, R. VI, 902). Numerous units were installed on a free trial basis (R. III, 1812, 2120, 2135, 2165; R. IV, 2275, 2320, 2707; R. V, 3469).

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[1]The invention was also used to process a bronze casting for copper lines and for salt or acid waters.

The company's customers included the most responsible and informed buyers in America: the United States Government,[2] State schools, colleges and institutions,[3] steamship companies,[4] oil well drilling companies,[5] major oil companies,[6] lumber and plywood mills,[7] department stores,[8] laundries,[9] restaurants,[10] and numerous other substantial businesses and manufacturing plants.[11]

Without exception every witness who had used the unit in the normal, practical installations for which it was intended testified to beneficial results. Ninety-two witnesses testified to results obtained in more than 255 installations. Witnesses from every walk of life appeared, including representatives of the following industries and institutions: air conditioning and refrigeration,[12] newspaper,[13] canning,[14] meat packing,[15] marine repair,[16]

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[2]R.IV, 2325-2340; 2677-2687; 2688-2703; 2704-2718.

[3]R.III, 2218-2233; R.IV, 2838-2849; 3366-3390; R.V, 3460-3493.

[4]R.IV, 2388-2412; 2637-2663; 2672-2677; 2748-2763; 2892-2906; 3168-3178; 3392-3397; 3397-3405; R.VI, 1026-1062; 1066-1099; 1100-1129; 1131-1161; see also RX 48, R.VI, 1013-1017.

[5]R.III, 2033-2060; R.V, 3409-3436; 3436-3450; 3518-3529, 3543-3558; 3559-3563, 3583-3611; 3705-3723.

[6]R.III, 2145-2155.

[7]R.III, 1963-1973; R.IV, 3101-3118; 3119-3132; 3133-3142; 3178-3190; 3220-3226; 3237-3252.

[8]R.III, 1839-1891; 1976-2011.

[9]R.IV, 2598-2620; 3190-3202; 3329-3338.

[10]R.III, 1804-1839; 1839-1891; 1976-2011.

[11]R.III, 1892-1930; 2090-2114; 2157-2192; 2268-2291; R.VI, 2551-2559; 2764-2772; 3077-3089; R.V, 3530-3543; 3564-3581; 3686-3704.

[12]R.III, 1931-1963; R.IV, 2268-2291.

[13]R.IV, 2292-2296, 2307-2325; 2296-2307.

[14]R.III, 2157-2192.

[15]R.III, 1892-1930; R.V, 3612-3625.

[16]R.IV, 2346-2360.

lumber and lumber products,[17] petroleum,[18] restaurant,[19] school,[20] department store,[21] supermarket,[22] fish processing,[23] hotel,[24] ranching and farming,[25] nursery,[26] bottling[27] and tool manufacturing,[28] as well as private homes and apartment houses.[29]

In the steamship industry alone the testimony showed that 281 Evis units (all but a few of which are in addition to the 255 units mentioned above) were in use on 245 vessels of 76 shipping concerns, including such internationally known companies as American Mail Line, American President Lines, Isthmian Steamship Company, Luckenbach Steamship Company, Moore-McCormack Lines, Inc., Matson Navigation Company, Pacific Far East Lines, Inc., Pacific Transport Lines, Pope & Talbot Inc., Rotterdam-Lloyd Line, Swedish American Line, Transoceanic Marine Corporation, United Fruit Company and Waterman Steamship Corporation (R. VI, 1013-1017). Many of these companies equipped their vessels only after they had first established to their own satisfaction, through actual ship-

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[17]R.III, 1963-1973; R.IV, 3101-3118; 3119-3132; 3133-3142; 3178-3190; 3220-3226; 3237-3252.

[18]R.III, 2033-2060; R.V, 3409-3436; 3436-3450; 3518-3529, 3543-3558; 3559-3563, 3583-3611; 3643-3673; 3705-3723.

[19]R.III, 1804-1839; 1839-1891; 1976-2011.

[20]R.III, 2218-2233; R.IV, 2838-2849; 3366-3390; R.V, 3460-3493.

[21]R.III, 1839-1891; 1976-2011.

[22]R.IV, 2551-2559.

[23]R.IV, 2474-2481; 3352-3362.

[24]R.V, 3493-3502; 3502-3516.

[25]R.III, 1732-1777; 1804-1839; 2011-2032; 2114-2129, 2138-2145.

[26]R.III, 2069-2090; 2234-2242; 2243-2253; 2253-2266.

[27]R.III, 2129-2137.

[28]R.III, 2060-2067.

[29]R.III, 1777-1804; 2011-2032; 2033-2060; 2069-2090; 2253-2266; R.IV, 2875-2891; R.V, 3675-3685.

board trial, that the Evis unit produced the results for which they were looking (R. IV, 2443). United Fruit Company has installations on 25 vessels, Waterman Steamship Corporation on 30 vessels, Luckenbach Steamship Company on 14 vessels, and the Military Sea Transport Service of the United States Government on 4 vessels (R. VI, 1013-1017).

Witnesses testified to successful installations on boilers, air-conditioning equipment, evaporative condensers, commercial laundry machines, ice-making machines, dishwashers, drains, coffee urns, refrigeration equipment, hospital equipment, showers, nozzles, pipes, valves, and a host of other types of equipment used in water systems (see Appendix C).

Experienced operating engineers performed carefully controlled parallel tests by installing an Evis unit on one piece of equipment and leaving other identical or similar equipment unchanged. In each instance, marked differences were evident. With the equipment operating at the same time and under similar conditions no change occurred in the untreated equipment; on the Evis-treated equipment, old scale deposits were removed and scaling was prevented.[30]

These witnesses were not the ignorant and the gullible. With few exceptions they were licensed professional or

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[30]The Post Office and Courthouse Building in Fresno, California (R.IV, 2325-2340; 2677-2687); the plant of the Central Valley Ice Company in Fresno, California (R.IV, 2268-2291); the Fresno Bee Building, Fresno, California (R.IV, 2292-2296; 2307-2325; 2296-2307); the Bridgford Packing Company plant at Anaheim, California (R.III, 1892-1930); the G. W. Hume Company cannery at Turlock, California (R.III, 2157-2192).

operating engineers with experienced backgrounds in operating water systems and related equipment. They came from various parts of the country and, as noted above, represented all segments of the economy, ranging from Federal and State agencies through scores of nationally known concerns down to the individual proprietor operating his own cleaning establishment. Testimony of successful performance came from representatives of such informed buyers and users as the United States Post Office Department (R. IV, 2325-2340; 2677-2687), the United States Navy Department (R. IV, 2688-2703; 2704-2718), the General Services Administration of the United States Government (R. IV, 2677-2687), G. W. Hume Company (R. III, 2157-2192), Bridgford Packing Company (R. III, 1892-1930), American Rock Wool Corporation (R. IV, 3077-3089), the Fresno Bee (R. IV, 2292-2296; 2307-2325; 2296-2307), Central Valley Ice Company (R. IV, 2268-2291), North Pacific Plywood Company (R. IV, 3220-3226), St. Joseph's Hospital (R. IV, 3339-3349), Knott's Berry Farm (R. III, 1804-1839), Union Ice Company (R. III, 1931-1963), Buffum's Department Store (R. III, 1839-1891), The Harris Company (R. III, 1976-2011), Pacific Western Oil Corporation (the producing company for Tidewater Associated Oil Company) (R. III, 2145-2155), Three States Natural Gas Company (R. V, 3564-3581), Rowan Oil Company (R. V, 3705-3723), Delta Gulf Drilling Company (R. V, 3436-3450), Bercut-Richards Packing Company (R. IV, 2536-2551), Roy Guffy Drilling Co. (R. V, 3409-3436), Helmerich & Payne, Inc. (R. V, 3518-3529; 3543-3558), Pope & Talbot, Inc. (R. IV, 2388-2412; 3397-3405; R. VI, 1131-1161), Union Oil Company (R. VI, 1066-

1099), American President Lines (R. IV, 2748-2763), Transoceanic Marine Corporation (R. IV, 2637-2663), Waterman Corporation of California (R. IV, 2672-2677; R. VI, 1026-1062), American Mail Line (R. IV, 3392-3397), United Fruit Company (R. VI, 1066-1099), and Nehi Bottling Co. (R. III, 2129-2137).

In Appendix B to this brief we set out the names and the occupations of petitioners' witnesses (with record references to their testimony). A mere glance at this list discloses the force and integrity of the testimony presented. Virtually every witness was concerned with the control and solution of water problems as an important and integral part of the business or industry in which he was engaged. In most instances the witness had the direct responsibility for the proper, efficient and economic maintenance and operation of the water system involved. The testimony of every witness was that substantial, and in most cases exceptional, benefits resulted from the use of the Evis unit—benefits which could be and were observed objectively. In a number of instances demonstrative proof, consisting of actual samples taken from the water systems, was brought into the court room.[31]

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[31]Sections of pipe showing removal of scale produced by Jack F. Manney, Jr., shop planner at the United States Naval Ammunition Depot at Mare Island, California (RX 49A and B, R.VI, 1018; 2-5/6168-1; R.IV, 2692-2693); sections of pipe produced by Paul H. Ralston, San Mateo, California, branch manager, Cook's Oil Company (RX 50A and B, R.VI, 1019, 2-5/6168-1; R.IV, 2880); samples of scale removed from coffee urns produced by Walter Knott, founder and owner of Knott's Berry Farm, Buena Park, California (R.III, 1028-1032); samples of scale removed from three 100-ton evaporative condensers at Buffum's Department Store at Santa Ana, California (R.III, 1849-1853); samples of scale removed from a 250 horsepower boiler at the plant of American Rock Wool Corporation, Tacoma, Washington (R.IV, 3081-3084).

The force of the testimony can be appreciated only by an actual look at what the witnesses said, and earnestly we ask the Court to consider but a few pages quoted from the many thousands before it. For example:

Mr. Shepard, chief of the construction and supervision branch, Public Building Service, General Services Administration of the United States, who is responsible for the mechanical equipment in all Federally owned and operated buildings in California, Nevada, Arizona and Hawaii (R. IV, 2678), testified (R. IV, 2680-2683):

> "Q. How many units of the Evis Water Conditioner do you have installed in various Government properties?
>
> A. Well, let's see. I would say about 11 or 12.
>
> Q. Now, can you tell us where those units are located?
>
> A. Well, we have four in Fresno, one in the Border Station at San Ysidro, California, two in the Tucson, Arizona Post Office, one in the Colusa, California Post Office, one in the Brawley, California Post Office, and one in the Calexico Border Station, and one in the Calexico, California Post Office. That's all I recall at the present time. There may be one or two others; I can't remember.
>
> * * * * *
>
> Q. * * * Can you just tell us briefly what the problem was before the installation of the [first] Evis and then what happened after it was installed?
>
> A. In the Fresno Post Office we have what we call an evaporative type air conditioning system and its refrigeration. We circulate the water through cooling coils through various systems in the building. The water is cooled by evaporation and a large amount of water is used, passing through the cooling coils. It's

cooled and re-cooled and recirculated. That was where we had the problem with the water.

Q. And how did that problem evidence itself, so far as the equipment was concerned?

A. Well, from the very beginning when the system was installed in 1940 * * * we had trouble with formation of a flinty, hard scale in the tubes, which necessitated the annual cleaning of these tubes by manual labor. The fact is, the substance was so hard we had to drill it out with an electric drill * * *.

* * * * *

A. * * * I believe it was in 1953 that I installed the first Evis Conditioner on the makeup line to the air washers, to one of the air washers. I installed this to test it to see what it would do, to see if it would improve the condition. * * *

* * * * *

Q. Well, just tell us what condition you have observed after the installation.

A. Well, I looked on the inside of the coils and the—while the scale had not entirely disappeared, it had softened to a point where it could be easily cleaned out. It wasn't necessary to use the electric drill."

Mr. Shepard further testified that during 1953 the other identical air washers in the building were operated without Evis units and continued to form flinty hard scale; that he installed units on these washers in 1954 and immediately experienced the same beneficial results; that as a result of this experience in Fresno he recommended installations in the many other Federal buildings mentioned in his testimony (R. IV, 2682-2683).

It is more than a matter of interest that it was in this very building, the Federal Court House and Post Office Building in Fresno, that the Hearing Examiner (who twice held that the Commission had failed to sustain the charges in its complaint) took Mr. Shepard's testimony, the testimony of Mr. Crosby, his Superintending Engineer, and that of other witnesses.

Mr. Manney, a shop planner in the Naval Ammunition Depot at Mare Island, California, testified to the removal of heavy scale incrustations in water pipes installed in Government quarters (R. IV, 2693):

> "A. * * * Frankly we were amazed or I was. I was amazed when I took the piece of pipe out.
>
> * * * * *
>
> A. After this sample conditioner was used, we purchased three and—I mean there were three that was installed at the wash house."

Mr. Westwick, a marine engineer for 32 years, testified as to his experience with an evaporator on the Pope & Talbot steamship "Explorer" (R. IV, 2394):

> "Q. Now, I am thinking now of the exact condition of the evaporator when you first installed the Evis. Was it then clean or was it scaled?
>
> A. No. It was very dirty and I asked if I should clean it first and he said, no, just install the Evis Conditioner and I did.
>
> Q. And what happened after you installed the Evis Conditioner?
>
> A. Well, about three days later, we had to shut her down, open her up for inspection, and here all the scale was laying down on the bottom of the evaporator eight inches deep.
>
> * * * * *

Q. What did you do then?

A. Just scraped it off and started it up again.

Q. Did you do anything further to clean the tubes?

A. No. We let her go for about eight months, I believe it was, because we were getting results. We didn't have to worry about it. Then we opened it for inspection and the tubes were clean, or the coils rather, were clean."

Mr. Deppman, superintending engineer for the Waterman Steamship Corporation, testified in regard to salt water evaporators (R. IV, 2674-2675):

"A. I think we have 16 or 18 or 19 ships equipped with one or more units.

Q. And over what period of time approximately have those ships been using the Evis Water Conditioner?

A. Oh, I don't know. I'd say around three and a half years, maybe.

Q. And on what type of equipment on board ship are the Evis Water Conditioners generally installed?

A. On the makeup and contaminated salt water evaporators.

Q. Now, prior to the installation of the Evis Water Conditioner on these ships, state whether or not it was necessary in the ordinary maintenance of the evaporator equipment to use acids in cleaning and maintenance.

A. We used acids on some of the ships and other of the ships, it was all manual cleaning, hand scaling, every four or five days.

Q. Now, since the installation of the Evis Water Conditioner has there been a continued use of acids or has that been eliminated?

A. I haven't ordered a gallon of acid in the last two and a half or three years, I would say, for any of my ships that are under my jurisdiction."

Mr. Gardner, vice president of Delta Gulf Drilling Company, testified in regard to five Evis units installed on the Company's drilling rigs (R. V, 3440-3441):

"A. * * *

We had been operating, I presume, for about three years a large steam rig in a field known as Chachoula. It is located down in Thibodeaux, Louisiana. * * * we had been drilling 14,000-foot wells for the Sun Oil Company. * * *

* * * the only water we could use was out of the swamp, and it was just as black as ink and was filled with salt minerals of various kinds and organic material. * * *

We had so much trouble with boilers, those wells would take three months or more to drill, and we were spending all the way from five to eight thousand dollars a well on chemical treatment and boiler maintenance. * * * we even, in spite of all we could do, had to junk one set of boilers and replace them with another * * *

* * * * *

A. On that particular rig we had four 150 pound super-heated boilers.

* * * I heard of this Evis Conditioner and * * * we installed that rather skeptically, I have to admit, on a lot of our parts, but we put it on, and in a period of time, I don't recall how long, the scale loosened and came—we blew it on out of the boilers, and I can attest to the fact that there was a big pile of scale down there and the boilers went ahead and cleaned up, and I personally saw them after the conclusion

of our final well at Chachoula, and I think we drilled two after we put that on, and I could see no scale in the boilers through the hand hole plates and various places where you can inspect.

Now, on the strength of that, we put Evis Conditioners on all of our steam rigs on the Gulf Coast."

Mr. Smith, maintenance foreman for Guy Mabee Drilling Company, testified as to the operation of an Evis unit on a water-cooled drilling rig (R. V, 3599, 3603-3605):

"Q. Now, what experience have you had with the cooling of the cylinder chambers since you installed the Evis water conditioners?

A. Well, I'll tell you, the rings last longer in those engines and they operate a lot longer since we have put those Evis' on there.

* * * * *

Q. Now, in the typical operation of a Waukesha engine on a big rig, in your experience, how long would it take to get a liner into that condition so it would have to be junked?

A. Well, in certain instances, it wouldn't take over a period of 90 days.

* * * * *

Q. Well, assume you have one of your better waters. * * *

* * * * *

Q. How long would they go sometimes?

A. Oh, I would say they would run six months.

Q. What is your experience with the Waukesha engines today with your Evis water conditioners installed?

A. I tore one down here about three months ago and I put the same liners back in it that had been running for about three years.

* * * * *

Q. Can you give us any estimate of the amount of saving in man hours and repair and replacement that you have experienced with the Evis water conditioners?

A. I'd say we'd cut our maintenance down on our water system, oh, two-thirds.

* * * * *

Q. Now, what has been your experience with the brakes on the rigs?

A. Well, complete stoppage of circulating of water on the brakes in my experience.

Q. And have you had trouble with those brakes since you installed Evis water conditioners?

A. I used to before I put those Evis' on there. I would have to acidize those drums at least once a year and I have never acidized them since I put them on [a period of three years]."

Mr. McCartney, district superintendent for Three States Natural Gas Company, Dallas, Texas, testified in regard to the operation of three Evis units installed on oil well equipment (R. V, 3567):

"A. * * * on one particular well we had at Talco, Texas, it is a Paluxy well, production from Paluxy zone, about 4350 feet, prior to the time we installed the Evis conditioner to treat corrosion in the hole, in the well, and we installed an Evis conditioner, sometime in August of '53 on that one particular well, Hargrove No. 5, we were having to pull that well due to corrosion and revolving seats of the pump and we were having a little rod trouble there, on an average of twice a week we had to pull this well to take care of it. We installed this Evis conditioner on the bottom of two and a half tubing and after the installation of the Evis conditioner, we pulled

that well twice within the past two years, and both times we pulled the well just merely to check the seats to see what condition they were in and we found no signs of corrosion."

Mr. Durst, a consulting petroleum engineer, partner in the firm of Gruy & Durst of Fort Worth, Texas, testified that before installing an Evis unit on equipment for oil well drilling rigs it was necessary to remove the equipment from service every three months and chip out accumulated scale. He further testified (R. V, 3710):

"For the six months' period following the installation of the Evis Conditioner, the treater operated normally and there was no necessity of cleaning the treater out. * * * I did visit the lease to see how this particular piece of equipment was working, because it seemed sort of a phenomenal thing to me, and I took a piece of screen wire, held it * * * under the bleeder line and collected in a matter of 10 or 15 minutes about a handful of particles of scale. I say particles; they were chunks about the size of the end of my thumb, and these chunks were soft, about the consistency of jello; they could be easily mashed. The treater operated satisfactorily up to that time without any need for shutdown or clean-out at all."

On cross-examination Mr. Durst, who is a graduate engineer, added the following cogent remarks (R. V, 3720, 3721-3722):

"Q. Do you know the principle by which the Evis Water Conditioner works?

A. I have no idea. I am extremely curious.

* * * * *

Q. And you attribute this action solely to the Evis Water Conditioner to the exclusion of anything else,

that there was nothing else present that could possibly have caused this prevention of scale except the Evis Water Conditioner?

A. That is correct.

* * * * *

THE WITNESS: May I add one little statement to that. It is an inconceivable thing that the Evis Conditioner does work. It was always a question in my mind and I rather compare it to the bumblebee; that aerodynamically he can't fly."

Mr. Knott, owner and operator of the world-renowned Knott's Berry Farm, one of the largest restaurants in the world (with its accompanying plant for preserving fruits), employing 800 people and serving more than a million and a quarter meals a year (R. III, 1805-1807), testified (R. III, 1811-1817):

"A. Well, of course, as everybody who uses and heats water, they have certain problems. And when they came along and assured us they could correct these problems, we were very skeptical, and, in fact, at first we refused to even be bothered about putting in as preposterous a looking thing as this. But after they offered to put it on, stand all the cost of putting it on, and leave it for a trial, we went ahead on a 90-day trial.

* * * * *

Q. And what was the size of that first unit?

A. I believe they called it the six-inch unit. * * *

Q. And do you recall offhand the cost of the unit?

A. I couldn't give it to you in exact dollars, but in round figures, about a thousand dollars.

Q. And on the basis of the 90-day trial period you had, you were satisfied enough had been demonstrated to you to warrant that investment?

A. Yes, sir, or we wouldn't have made it, most certainly.

* * * * *

A. I think we had about the same problem everybody has with evaporative condensers. The minerals out of the water condense around the tubes that carry the hot liquid that comes back from the refrigerator or from your compressors * * *.

* * * * *

A. The tubes were three-quarters of an inch, and they would build out about a quarter of an inch thick of this lime, and their cooling action would be very much retarded because of the insulation this lime or mineral on the tubes would cause, and they would have to be cleaned.

* * * * *

Q. Now, when this quantity of lime scale would build up on these tubes, would it be a hard scale?

A. Yes, it would be hard.

* * * * *

* * * you couldn't take a steel brush and get it off. It has to be either broken off by hammering or it has to be cut off with acid.

* * * * *

* * * but we tried very hard to use enough water treatment in the water to prevent that having to be done.

* * * * *

* * * we used softened water to begin with, but we were still having to add chemicals to prevent the scales from forming, and still we were not succeeding.

Q. * * * after the installation of the Evis water conditioner, what has been your experience with that particular unit so far as this problem is concerned?

A. We discontinued using any chemicals in the water, and the lime has gradually softened and left the

coils, and, for this last year, we have used absolutely no chemical at all, and the coils are completely clean."

Mr. Waldman, a partner in the Dallas City Packing Company, testified (R. V, 3619):

"Q. Do I understand correctly that every drop of water that goes into the plant goes through the Evis Water Conditioner?

A. That's right.

Q. What has been your experience with it in the past three years?

A. Well, it has reduced our corrosion problem to what I would call a minimum.

Q. And your answer applies to every type of line throughout the plant and the equipment that is involved therein?

A. Yes, valves and lines and flues."

Mr. Shaw, manager of a department store in Santa Ana with three 100-ton evaporative condensers, testified (R. III, 1863):

"A. The scale flaked off and loosened to the point where we could lift it off with a spatula, and a little bit of effort. At that time, we were convinced the Evis was doing the job. We were no longer interested in testing. We were only interested in getting the scale off. So, we removed it as fast as we could. No new scale has formed."

And (R. III, 1872):

"After we put in your Evis, I would say 60 days later, we went into it again. This particular time that we went into it, the holes were open. They hadn't become plugged * * *. We haven't had any trouble

since with our deposit taking on the baffle and nor have we had any trouble with the holes plugging up."

Mr. Shane, engineer for the American Rock Wool Corporation plant at Tacoma, Washington, testified (R. IV, 3081-3082):

"Q. Now, what changes, if any, did you note in the boiler scale after the Evis was installed?

A. Well, we noticed a distinct softening and sloughing off of the scale * * * we opened the boiler up thirty days after we put the Evis in to see what it was doing, and it had started to soften the scale up at that time. Then we opened it again in ninety days after, and it was still improving, and we opened it every six months in the general routine opening, and we had it opened again about three weeks ago, and there was very little scale left. It was very thin and soft."

Mr. Rogers, plant foreman for the Nehi Bottling Company, of Orange, California, testified (R. III, 2132-2133):

"Q. And with this chemical water softener in operation [prior to the installation of the Evis unit], did you have any scaling problems in the equipment, the soaker, or any of the washing or bottling equipment?

A. Yes, we did with the water softener. We had scale. Scale built up every once in a while. We would have to—well, I would say probably once a week, we would have to take out the jets and clean them off because they would become stopped up from scale.

* * * * *

Q. Since * * * [you installed the Evis approximately three-and-a-half years ago] what, if any,

changes have you noted in the condition of the scale on the equipment?

A. The scale has, well, our machine today has no buildup at all on the chain itself. There is still some in the corners, of the previous scale, but it is soft. It has become soft, so it is easy to remove."

Mr. Wiborg, in charge of steam equipment for Dickman Lumber Company in Tacoma, Washington, testified (R. IV, 3103-3106):

"Q. Before it was installed * * * what was the condition of your boilers in your normal experience so far as scale is concerned?

A. It scaled up in spite of our compounds.

* * * * *

Q. What happened to your scaling condition in the boilers after the Evis Water Conditioner was installed?

A. It gradually diminished.

* * * * *

The old scale isn't there any more.

* * * * *

Q. And what have you done so far as the use of boiler compound is concerned?

A. Discontinued."

Mr. Ryan, chief engineer and maintenance man for Leybold-Smith Shingle Company in Tacoma, Washington, testified (R. IV, 3135):

"Q. Now, Mr. Ryan, after the installation of the Evis Water Conditioner, what change, if any, did you notice in the boiler?

A. Well, I have noticed that I haven't got nearly the scale that I had accumulated before, but other than that, there has been hard scale that has accumu-

lated in the past years at a time, and this let loose and it has come out, and there hasn't been any build-up, because I check that approximately every two weeks."

Mr. Howard, port engineer for the American Mail Line in Seattle, Washington, testified (R. IV, 3393-3394):

"Q. Before the installation of the Evis water conditioners on these vessels, what was your customary practice with respect to cleaning the boilers?

A. They were cleaned, I would say, about every two weeks, and about every second trip the tubes had to be taken ashore and straightened out and put back again, and some had to be boiled out in order to get the scum off of them. They were all beat up with wooden hammers, or with whatever they used on the ships to do it with.

Q. What change, if any, have you noticed in your maintenance problems on the coils in the evaporators since the Evis water conditioners were installed?

A. Well, we haven't had them ashore since we put them on there.

The scale that forms there now is very soft, and it can be washed off. * * *

Q. Do you know whether other ships in the American Mail Line are also equipped with Evis water conditioners?

A. All of the American Mail Line ships are equipped."

Testimony similar to the foregoing could be quoted endlessly. Other marine engineers of long experience gave depositions at the ports of San Francisco, Oakland, Alameda and Oleum, California. Without exception, they testified that prior to the installation of Evis units serious

water-scale problems had been encountered in evaporators aboard their ships which demanded the use of large quantities of chemical solvents, and also required a great deal of labor in hammering, chipping and drilling; that these expenditures of materials and labor had been almost entirely eliminated by the installation of Evis units (R. IV, 2388-2412; 2637-2663, 3168-3178; RX 55, 56, 57, 58, R. VI, 1026-1065; 1066-1099; 1100-1129; 1131-1161).

In regard to the important problem of the prevention and removal of scale, 88 witnesses testified to the successful performance of 225 Evis units in the prevention of scale formation; 63 witnesses testified to the performance of 168 units in the removal of old scale deposits, including 43 Evis units which had benefited 74 boilers; 26 witnesses testified that 57 Evis units had benefited 99 installations of air conditioning and refrigeration equipment; 5 witnesses testified to successful results obtained with 55 units on 65 oil well drilling engine radiators and cooling lines; 68 units were shown to have been effective in preventing scale in various types of water heaters, urns, washers and marine evaporators; and 46 units had been beneficial in preventing scale in piping systems, nozzles, spray jets, various types of valves, and other miscellaneous uses. (See Appendix C to this brief where we set out a complete statistical analysis of the testimony concerning the prevention and removal of scale.)

In addition, numerous witnesses testified to other benefits derived from the treatment of water by the Evis unit in the other respects challenged by the Commission.

Fourteen witnesses testified to improvement of agricultural growth, leaching alkali from soils, prevention

and removal of deposits on leaves of plants, and inhibition of algae growth (see Appendix D to this brief).

Seven witnesses testified to the improvement in odor or taste of water, or improvement in the taste of coffee (see Appendix E to this brief).

Seventeen witnesses testified to the effective use of the Evis unit in the removal of grease from drains, the preventing of various types of stains and scums and the retarding of pitting of metal (see Appendix F to this brief).

Eighteen witnesses testified to benefits in laundry uses and efficiency of soap (see Appendix G to this brief).[32]

Not a word contradicts the testimony of these witnesses.

A truly dramatic instance of the effect of the Evis unit upon laundry operations was that described by the manager of the Rainier State School at Buckley, Washington. There, mentally retarded children who worked in the laundry were "trained to put just a measured amount of soap in a washing machine, [so that] once they have acquired that habit, * * * they will do it almost automatically" (R. IV, 3383). On the morning after the Evis unit was installed the washers were "boiling soap suds all over the place" before the operator could reduce the amount of soap used (R. IV, 3382).

As opposed to the foregoing the Commission did not introduce a single word of testimony concerning the Evis

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[32]These witnesses included two experts who performed a series of tests at the Peninsula Laboratories, Mountain View, California. The units used were properly installed, and rigid controls were maintained. The tests showed that, with the Evis unit, soap consumption was reduced 20 per cent, one-third less rinse water was required, and the residue of grease and lint which collected in the washing machine was reduced 50 per cent (R.IV, 2508, 2511, 3256, 3276, 3277).

unit in actual operation and use by members of the public. Instead it relied entirely upon the testimony of so-called expert witnesses. Five of these experts[33] testified to spectrographic and photomicrographic tests of the metal in the Evis unit. Since these tests were addressed entirely to the metal's physical composition, and since both the Hearing Examiner and the Commission held that this testimony failed to sustain the charge that the unit is not made of specially processed metal, we make no further mention of the testimony of these witnesses.

The remaining witnesses (with the exception noted at pp. 40 to 45, infra), testified concerning laboratory tests each had made upon water treated by the Evis unit. The tests were wholly artificial, either having no relevance to any claim made by petitioners, or conducted under laboratory conditions so alien to actual operating conditions as to have no probative value (see pp. 31 to 40, infra). On the basis of these tests alone—and with no consideration at all of what the Evis unit had accomplished in actual use—each gave his expert opinion.

Further, unlikely as it may seem, every one of these experts, with the single exception of Dr. Allison (whose results uniformly showed benefits from the use of the Evis unit, pp. 36 to 38, infra), failed to install and use the Evis unit in accordance with the manufacturer's instructions. Their failure in this regard was not harmless oversight, but so vital as to vitiate their conclusions (see pp. 44 to 47, infra). Not one of the experts save Dr. Allison sought instructions or assistance from the manufacturer. Indeed, in

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[33]Messrs. Abbitt, McBurney, Corfield, Czyzewski and Uman (R. II, 705, 358, 362, 925, 89).

the only two instances where petitioners knew that tests were being conducted and tendered their engineers to advise and assist in the installation and operation of the equipment, the offers were refused (R. II, 813; III, 1266-1267), in one case so contemptuously[34] that the Hearing Examiner held, on the basis of this occurrence and others, that the witness entered upon and conducted his so-called scientific tests with a preconceived opinion that the Evis unit was worthless, that his denial of a prejudgment of the merits was so evasive as to be unworthy of belief, and that "the factual content [of his testimony] is too intermingled and clouded with evasions, qualifications and attempted explanations" to constitute substantial evidence (R. I, 718-719).[35]

One of numerous instances which illustrates the total unreality of these laboratory tests is the case of Dr. Hoffman of the Bureau of Standards, the Commission's principal witness. Under cross-examination he testified that during his laboratory tests he visited the Experiment Station of the Department of Agriculture at nearby Beltsville, Maryland, and saw a unit in operation (R. III, 1202). When asked whether it was not a fact that the unit was working successfully, he replied (R. III, 1204):

> "I am a little reluctant to go into the installations in another department, if I can avoid it. It does not

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[34]Dr. Albrook of Washington State College. See especially R. II, 717-740.

[35]The associate of this witness, Dr. Adams, was relieved by his superior at Washington State College from further investigation of the Evis unit because of his "personal bias in the matter of conducting tests" (Decision of the Hearing Examiner, R.I, 718).

concern my tests any more than the mere inspection to see whether it was grounded."

At this point the Hearing Examiner sustained objections to any further questioning of Dr. Hoffman concerning this installation (R. III, 1204-1207). After petitioners had made offers of proof, however (R. III, 1207-1208), the Examiner modified his ruling (R. III, 1237) and thereafter Dr. Hoffman testified (R. III, 1339-1340):

"Q. Yesterday there was reference to the installation of the Evis unit at the United States Department of Agriculture Station at Beltsville—do you recall that?

A. I recall it.

Q. You were out there and examined that installation, did you not?

A. I was out there.

Q. You did not see the installation?

A. I saw it, the installation.

Q. There were two evaporator condensers, were there not?

A. There were.

Q. On one of which there was an Evis unit?

A. Yes.

Q. On the other there was not an Evis unit?

A. That is correct.

Q. And you observed, did you, Doctor, that the Evis unit was clean as compared with the non-Evis unit which was scaled?

A. I saw that, yes, sir.

Q. And you were advised, were you not, by the personnel at the station that in the case of the Evis unit they had at that time been able to operate it for eight weeks without cleaning as distinguished from their prior practice of cleaning it every 10 days to 2 weeks?

A. I was not so advised, but * * * I overheard this statement made.

Q. You were present, were you not?

A. I was present."

Dr. Hoffman was then further cross-examined (R. III, 1340-1343):

"Q. Now, Doctor, have you also had an opportunity to personally inspect other installations on United States Government property of Evis units?

A. I was over to the Old Dominion Building, I believe it is called, in Arlington, to see an installation there.

* * * * *

Q. That installation, Doctor, in that did you observe that this cooling unit * * * had de-scaled with the Evis unit?

A. I saw the unit only once. The unit had parts of the pipes where scale had broken off and was lying in the bottom. I know nothing about the history of it or what caused that to fall off. I could not make any positive statements as to the value of the water treatment.

Q. In the course of your inspection at that building did you make inquiry of the operating personnel there as to what the conditions had been before and after the installation of the Evis unit?

A. I forget whether I made any inquiry. I was there mainly to see the grounding system that they were using. * * *

* * * * *

Q. I see. The fact that the unit was de-scaling there and you saw evidence of that in your opinion carried no weight one way or the other, Doctor, is that it?

A. I have to base that—I hope you understand—on the fact that I did not see another one close by under the same circumstances which did not have an Evis conditioner on it.

Q. All right.

A. I must hold to that.

Q. * * *

Had it come to your attention prior to the time that you made this visit that there had been a scaling problem at this particular building and that the problem was being helped by the Evis unit, in other words, Doctor, perhaps I should ask you first, how was it that you happened to make this inspection?

A. Somehow I learned that a unit was installed there. This, I believe, is evidence that they had a scaling problem, and then knowing that the unit was there I believe I took the initiative in calling and asking to see how the grounding was done. I believe those are the honest facts.

Q. Doctor, are you aware * * * that there are a number of Evis installations at other Government stations or buildings?

A. I have heard that there were, but I have made no note of them and I would not know where they are."

And yet Dr. Hoffman gave his opinion in these proceedings on the basis of completely irrelevant, misconducted and artificial laboratory tests. In reaching this opinion he totally disregarded the actual functioning of Evis units under normal operating conditions in Government buildings within a few miles of his laboratory; he took no interest in, and made no inquiry concerning, other Government installations of which he had knowledge.

It is of this witness that the Commission, in the decision under review, says (R. I, 811):

> "Dr. James Irvin Hoffman, Chief of the Surface Chemistry Section and Assistant Chief of the Chemistry Division of the National Bureau of Standards * * * testified that based upon his scientific knowledge and the experience he had had with the Evis Water Conditioner, it could have no effect upon water."

The Commission's expert testimony was as follows:

Eight experts made soap hardness or similar tests which proved that Evis treated water did not differ chemically from untreated water.[36] This proved exactly what petitioners have represented. Over and over the Evis literature states that the unit does not change the chemical composition of water (CX 8, R. VI, 827; CX 27, R. VI, 879, 881; CX 31, R. VI, 896, 899). When the testimony of the eighth of these witnesses was offered by the Commission, the Hearing Examiner finally inquired (R. V, 3952):

> "May I ask you, what is the relevancy, since there is no claim of chemical change resulting from the use of an Evis? What is the purpose of showing the chemical analyses?"

Four of the witnesses[37] performed "dry scale" tests, a test similar to putting a teakettle on the stove, boiling it dry and then measuring the solids deposited on its walls.[38]

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[36]Merrell (R.II, 8), Carty (R.II, 110), Kleiner (R.II, 328), de Bussieres (R.II, 479), Benezra (R.II, 559), Albrook (R.II, 584), Adams (R.II, 846) and Gildea (R.V, 3947-3953).

[37]Mallory (R.II, 135-138), de Bussieres (R.II, 479), Benezra (R.II, 559), and Johnson (R.V, 3793).

[38]Since the issue of scale is so important in this case, we discuss these tests further in our argument (pp. 67-70, infra).

Petitioners have never represented that the Evis unit removes solids from water. No water treatment can do this. The function of water treatments is to affect the solids in water, physically or chemically, so that in operation they are flushed out with waste water or, in the case of a closed circulating system (such as that described by Mr. Shepard, supra, pp. 10 to 12), are deposited in a soft and readily removable form rather than as flinty scale. The Commission's own witness, Dr. Hoffman of the Bureau of Standards, characterized these dry-scale tests as "irrelevant * * * There was no sense in burdening the hearing with those experiments" (R. III, 1215).

Commission witness Merrell put odor-bearing water in two beakers, added Evis treated water to one and untreated water to the other[9] and "sniffed" each sample. He detected no difference (R. II, 15).[39]

The same witness filled one beaker with treated water and one with untreated water, let each stand 30 days, and then noted that each seemed to have the same amount of dust and scum on top (R. II, 15). From this he concluded that the Evis unit does not "keep drains and sumps free from scum." On cross-examination he finally characterized his own experiment as "a very weak test * * * just cooked up to disprove that one statement that was made in the literature" (R. II, 70).

To disprove petitioners' claim that the Evis unit "aids operation of base exchange softeners" the same witness passed a little more than 16 quarts of both treated and

[39]In direct violation of petitioners' specific instruction not to mix treated and untreated water (CX 31, R.VI, 898).

untreated water over two ounces of ion exchange material (see pp. 55 to 56, infra, for a description of the ion exchange process) and analyzed the water at the conclusion of the experiment (R. II, 12). The experiment took about three hours (R. II, 51). The normal cycle of base exchange softeners in actual operation is from two to four weeks (R. II, 51). Dr. Adams (see footnote 36, supra), testing for the same purpose, dripped water over ion exchange columns for periods ranging from a little over seven hours to 30 hours.

Of these tests the Hearing Examiner said (R. I, 724):

> "Witness Merrell's experiment lasted about three hours, and Witness Adams' tests ranged from 430 minutes (seven hours and ten minutes) to thirty hours. It was shown that the normal operating cycle of a base-exchange softener is at least two to four weeks. It would appear, therefore, that neither experiment was conducted in a manner at all comparable to the practical operation of a base-exchange softener * * *."

Witnesses Mallory and Benezra rinsed glasses in Evis treated and untreated water, let them dry and said they could observe no difference (R. II, 145, 576-577).

Witness de Bussieres found that both treated and untreated water froze at the same temperature; that the conductivity of each was the same (R. II, 478-479). Neither test was shown to have the faintest bearing on any Evis claim or to be related in any way to the performance of the unit in actual operation.

Witness Wagner made infrared spectro-analyses of treated and untreated water, testing for an "alteration in the molecular structure, the geometrical configuration of

the molecules'' in the water (R. II, 888). His spectrograms showed only the molecular structure of the water and disclosed nothing concerning the solids in it or the form in which they occurred (R. II, 889, 893). His test could have not the slightest relevance to the claims of petitioners that the Evis unit affects the solids in water in such a way as to achieve the demonstrated beneficial results.

Dr. Hoffman, to whom we have referred (supra, pp. 27 to 31), made a surface tension test of treated and untreated water and found no difference. Petitioners have never represented that the Evis unit affects the surface tension of water. But Dr. Hoffman sought to relate his test to the representation of petitioners that the Evis unit affects the behavior of water at the interface, i.e., its point of contact with metal or other substances. He testified on direct examination (R. III, 1118):

> ''A. Any change in the behavior in water at the interface must be accompanied by a change in the surface tension.''

The cross-examination of Dr. Hoffman after this categorical statement is illuminating. First, after long, critical and even embarrassing examination, he admitted that his surface tension test had been incorrectly conducted and for that reason ''should be summarily discarded as valueless'' (R. III, 1360, 1362). He then admitted that in fact the surface tension test was not a conclusive test of ''the effect of Evis on water'' (R. III, 1369):

> ''Q. Do I understand from your testimony that you feel that the tension test is a final and conclusive test as to the possibility of Evis' effect upon water,

having in mind that the water as we have just said passes through the pipe and through the Evis is in contact with a solid, whereas on the other hand in the tension test you have the isolated water not being in contact with the pipe or the Evis itself?

* * * * *

A. I would say no."

He then specifically recanted his original testimony (R. III, 1371):

"Q. * * * [Does] the surface tension test * * * necessarily demonstrate the characteristics of that water when it comes in contact with a solid.

A. Not completely."

And finally he admitted that a change in the physical characteristics of water would not necessarily have to be accompanied by a change in surface tension (R. III, 1312):

"* * * Let me ask you this. Would a change in the physical characteristics of water, any change, necessarily * * * have to be accompanied by a change in surface tension?

A. No, sir.

Q. In other words, Doctor, there could be some changes in physical properties of water without a corresponding change in surface tension?

A. That is correct."

Further, with reference to petitioners' claim that the processing of the Evis unit affects the crystalline structure of the metal, which in turn affects the behavior of water, he conceded (R. III, 1315):

"Q. Now, Doctor, are you familiar with the fact that the angle of contact of water may be affected by

the crystalline structure of a piece of metal such as brass?

A. Yes, sir.

Q. You know that?

A. Oh, yes.

Q. Are you familiar with the fact that the same is true in the case of iron?

A. I presume it is."

Dr. Allison conducted a number of tests to determine, in his language, "what effect [the Evis unit] had on soil properties and plant growth" (R. II, 236-237). The "soil" he used—a finely separated, graded and aerated soil (R. II, 253)—bore no relation to soil encountered in actual farming operations. His test for plant growth consisted of observing corn seedlings grow for seven weeks in 12 flower pots in a greenhouse, and his tests on soil were performed on small laboratory quantities. And yet, even under these conditions, Dr. Allison's records, when produced on cross-examination (R. II, 257-258), showed:

(1) The corn plants irrigated with Evis treated water averaged one inch higher in growth—30 inches as compared to 29 inches (R. II, 289).

(2) In a test to determine the penetration of water into the soil the Evis treated water penetrated to a depth of .114 centimeter as compared with .108 for untreated water (R. II, 267-268).

(3) In a test to determine the effect of water upon the alkalinity of the soil the Evis treated water reduced alkalinity from a pH 9.3 to 8.7, or a difference of .6, while untreated water reduced the alka-

linity from 9.3 to 8.9, or a difference of .4. Dr. Allison testified (R. II, 295):

"Q. So the difference in the change in the case of the Evis treated soil was half again as large as the difference in alkalinity of the soil that did not receive the Evis treated water, is that correct?

* * * * *

A. That is correct."

(4) In an electrical conductivity test (which discloses the salinity of the soil) the Evis treated water reduced the rate from 3.80 to .99, a difference of 2.81, whereas untreated water reduced the rate from 3.80 to 1.32, a difference of 2.48 (R. II, 298).

(5) In a moisture retention test the soil irrigated with Evis treated water contained 26.0 atmospheres of water compared with 25.6 atmospheres with untreated water. Dr. Allison testified (R. II, 281):

"Q. So that there was in this particular instance, in the case of the Evis treated water, it showed a greater degree of moisture retention than did the untreated water, is that not correct?

A. Well, according to the figures there is a slight difference."

(6) In a test to determine the exchange sodium potential of soil the Evis treated water reduced the potential from 48 to 14, whereas untreated water reduced the potential from 48 to 15. Dr. Allison testified (R. II, 301):

"Q. * * * There is a difference between the rating of 14 in the case of Evis treated water as distinguished from the rating of 15 in the case of untreated water?

A. That is right.

Q. Nevertheless it is a change in a beneficial direction, is it not, doctor?

A. I would say it is a change and in a beneficial direction."

In short, each of these tests performed by Dr. Allison disclosed a beneficial difference in favor of water treated by the Evis unit.

In addition to the foregoing, the Commission introduced testimony of three laboratory tests designed to show that the Evis unit would not remove or prevent scale. Each of these tests is to be compared with actual operating conditions on the oil rigs, steamships, boilers, condensers, refrigerating equipment and other installations discussed in the testimony above quoted (and see pp. 67-70, infra).

The first of these tests was that of Mr. Merrell, who had "sniffed" the water and detected no difference, and who had admitted that his "test" for the prevention of scum was "just cooked up to deny that one statement" (supra, p. 32). He trickled treated and untreated water through two eight-inch sections of half-inch badly scaled pipe at the rate of a little more than a quart a minute for four weeks. At the conclusion of this "experiment" he weighed each section and found that each had lost one gram (R. II, 16).

Dr. Weast conducted the next experiment in Cleveland. For thirty weeks he flowed, at intervals approximately one hour apart, ten gallons of treated and untreated water through two parallel pipes heavily encrusted with deposits. Five times during the experiment he cut off short sections of pipe, split them longitudinally and photographed them

(R. III, 991; CX 51 and 52, 2-13/6168-1 and 2-14/6168-2). He found no observable removal of encrustation. Apart again from the dissimilarity of this experiment to actual operating conditions, and apart from Dr. Weast's failure properly to install the equipment (see p. infra, 46), Dr. Weast readily agreed that the deposits on the pipes with which he experimented were not the scale customarily encountered in water operations, but a mixture of scale and corrosion occasioned by the unusually high oxygen content of the water. Quite frankly he testified (R. III, 1008):

> "Q. Would you say this [deposit on the pipes] was in the category of rust?
>
> A. Yes."

And again (R. III, 1073):

> "Q. And turning back now to the corrosion question I asked you, would your experience here in Cleveland with similar problems lead you to believe that in this case you had primarily a corrosion of pipes as a result of the high oxygen content of the Cleveland water?
>
> A. That is my opinion."

And again (R. III, 1027):

> "Q. Well, now, in the opinion that you rendered to the Hearing Examiner here as to the value of Evis in removing scale, would I be correct in assuming that that opinion was limited exclusively to the—what you have referred to as a 'rusty type of scale'?
>
> A. Yes."

There is no representation anywhere in the Evis literature that the unit will remove encrustations resulting from

the corrosion of metals, as distinguished from ordinary scale deposited from the magnesiums, calciums and other solids customarily present in water.

The third test was made by Dr. Hoffman of the Bureau of Standards, to whose experiments we have referred above (supra, pp. 34 to 36). He took four sections of heavily encrusted pipe 2½ inches long (R. III, 1132, 1231, 1296), baked them in a dry oven at 100° Centigrade for 30 minutes,[40] trickled about half a pint per minute of treated water through three sections, and of untreated water through one section, for a period of 68 days (R. III, 1133), found scale remaining in all four (R. III, 1137) and concluded that the Evis unit will not remove scale.[41]

Finally, the Commission relied on the testimony of Drs. Albrook and Adams at Washington State College. These are the witnesses to whose credibility we already have referred (supra, p. 27). Under their supervision two Evis units were installed on coffee urns serving the students on the Washington State campus. These two urns, plus a third one supplied by chemically treated water, and

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[40]A procedure which is quite inexplicable, is hardly to be expected in practical installations, and which made the calcium carbonate in the scale as hard as cement (R. VI, 2977).

[41]Quite apart from the obvious lack of any probative value in this "experiment", as compared to actual operating conditions, and quite apart from the fact that Dr. Hoffman's conclusion from his "experiment" was directly opposite to results which to his knowledge were being obtained under actual operating conditions in installations on Government buildings within a few miles of his laboratory (supra, pp. 27 to 31), the results of this experiment actually show a difference beneficial to the Evis unit. An examination of the photographs of the sections of pipe used in the experiment (CX 54 and 55; R. VI, 948-949, 951-952) shows a lessening of scale in the sections through which the Evis treated water trickled. (See especially the photographs of section No. 4 before and after the experiment, CX 54, R. VI, 948-949.)

a fourth one supplied with untreated water, were operated for five and one half months. They were then opened and inspected, and photographs of all four were introduced in evidence (CX 39, R. VI, 916). A mere inspection of these photographs on Commission's Exhibit 39 (pictures 1 and 4 are the Evis treated urns, picture 2 the water softener urn, and picture 3 the untreated urn) shows the extraordinary difference in favor of the Evis treated urns as compared with the untreated urn. It was the attempted explanation of this obvious result by Drs. Albrook and Adams (R. II, 596, 770-771; 851-853; 878), among other things, which led the Hearing Examiner to characterize their testimony as "too much intermingled and clouded with evasions, qualifications and attempted explanations" to constitute substantial evidence (R. I, 719).

Dr. Albrook, and his assistant, Mr. Flay, also testified concerning units installed on a coffee urn at the Hamburger King restaurant in Spokane, on a dishwasher at the Caravan Inn in Spokane, and on a hot water heater at the same Inn. Here again, although witness Flay said that he observed no difference, the demonstrative evidence clearly shows superior performance by the Evis unit. In the case of the coffee urn, after nine months of operation with an Evis unit the coils and the interior of the urn show a formation of a soft-type, readily removable scale, as compared to the hard, flintlike scale that had been deposited in the urn during four months of use prior to installation of the Evis unit (see photograph, CX 42, R. VI, 925), and the coils in the tank of the hot water heater with the Evis unit, after only 36 days of operation (R. II, 599-600), show definite descaling (see photograph, CX 41, R. VI, 922). As

to the dishwasher, witness Flay said that he went to the Inn from time to time and did not observe any difference in the glassware washed with treated and untreated water, and, generally, that there was no "apparent difference in the water on Evis treated water or raw water in the dishwashing" (R. II, 514). But when Dr. Albrook, on later cross-examination, produced the notes written by Flay at the time of his visits, the notes disclosed (R. II, 805):

> "October 31, 1952 [one week after the Evis unit began functioning], talked to dish washer, and asked her whether or not she noticed anything different in the quality of water in the last week, and she said that the water seemed better, and that the water seemed better [sic], and the dishes apparently dried better, and that there seemed to be more suds the last week."

C. The failure by the Commission's experts to follow the manufacturer's instructions in their installations of the Evis unit.

The Evis Manufacturing Company commenced business in 1952. At that time the Evis unit, in the limited areas in which it had been installed, had operated successfully without grounding against electrical currents.

> "* * * we were under the impression * * * that all you had to do was install it in the pipe line, and it would remove the scale and prevent its reformation and in many, many cases that is so, that is true. We have thousands of installations where that is actually the case * * *" (R. IV, 2922).

Accordingly, the manufacturer's first instructions merely provided for fitting the unit into the main water supply line (CX 2, R. VI, 818). As numerous installa-

tions were made in different areas, however, difficulties appeared.

> "* * * so the field operators, the men in the field, began investigating these installations and trying to determine what the phenomenon might be that was causing it not to work * * *" (R. IV, 2923).

These investigations disclosed that electrical disturbances in the pipe lines were causing the trouble and that the installation of shunting and grounding wires was necessary to make the unit function (R. IV, 2923-2928, 3146-3147, 3154-3155, 3159-3162). The influence of electrical currents upon the behavior of water, of course, is well known to science, though little understood,[42] and it is also known that the effect of these currents varies from place to place, depending upon the physical environment[43] and the installations.[44]

As the engineers and representatives of Evis Manufacturing Company pooled their knowledge and experience concerning the effect of electrical currents on the Evis unit, the manufacturer amended its instructions to reflect

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[42]See the next section of this brief, infra, pp. 47 to 56.

[43]Thus, in the little town of Bellville, New Jersey, where "you take a shovel and dig down two feet and there was water; everything was perfectly grounded like a ship at sea" (R. IV, 2925), the Evis unit functioned successfully in every installation without grounding. Five miles away it was impossible to make an Evis unit function (R. IV, 2925).

See, also, supra, pp. 6 to 7, showing the extraordinary success of Evis installations on ships where all equipment is perfectly grounded (R. IV, 2469).

[44]See infra, pp. 50 to 51, giving an instance where the cathodic method of water treatment protected 30 miles of pipe line with the use of half an ampere, whereas on another pipe line with faulty connections 1200 amperes were required to protect 50 miles of line.

these discoveries. The Installation and Service Bulletin issued by petitioners six months before the institution of these proceedings (RX 34; R. VI, 1009-1012) was prepared at a meeting of approximately 30 representatives of the Company from all parts of the United States, who "pooled all of their knowledge of Evis installation techniques and * * * put it all into that bulletin" (R. IV, 2931). This bulletin was in the hands of the Commission long before these proceedings were brought, as was also another bulletin issued at about the same time (CX 31, R. VI, 896-900) bearing a stamp showing its receipt by the Bureau of Investigation of the Commission five months before the complaint was filed. These instructions emphasized the necessity for grounding and described in detail how it should be done. They also contained specific instructions for the conducting of laboratory tests. The instructions were simple, reasonable and readily performable by anyone seeking to test the unit. Among the latter instructions were (Id., 898, 899):

1. Treated and untreated water should not be mixed.

2. There should be no cross-connection piping.

3. In boiler tests means for blow-down should be provided.[45]

Not one of the Commission's expert witnesses (with the exception of Dr. Allison, supra, pp. 36 to 38) complied with these instructions. Over and over the Hearing Examiner, who heard the witnesses, noted:

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[45]See pp. 66-70, infra, for a description of blow-down.

"A number of the manufacturers' instructions relative to the installation of the Evis Water Conditioner were not followed * * *" (R. I, 708).

"This test contravened the manufacturers' instruction * * *" (R. I, 714).

"Respondents' directions for the installation of the Evis Water Conditioner were ignored * * *" (R. I, 715).

"A number of the manufacturers' instructions relative to the installation of the Evis Water Conditioner were not observed" (R. I, 716).

"* * * the manufacturers' instructions for the installation of the Evis unit were not complied with in a number of particulars * * *" (R. I, 716).

"Since it appears that the Evis Water Conditioner used in this test may not have been installed in accordance with the manufacturers' instructions therefor, it must be concluded that the test is not decisive and cannot serve as a sound basis for a conclusion that the Evis Water Conditioner will not prevent or remove scale in pipes" (R. I, 717).

"Concerning the instructions of the manufacturers for installing the Evis Water Conditioner, [the witness] testified:

> '* * * We didn't pay any attention to such instructions,'

and that he made no effort to determine whether the unit was 'properly installed' " (R. I, 717-718).

"The evidence shows that this procedure [petitioners' instructions for blowdown] * * * was not taken into consideration in the tests * * *" (R. I, 721).

Specifically, the omissions were as follows:

Merrell and Carty: No grounding; cross-connection piping (R. II, 29, 77-81).

Mallory and Wakeman: No grounding (on the contrary the heat for this experiment was supplied by electric wires wrapped around the piping!); cross-connection piping (CX 5A; R. VI, 826; CX 5B; R. VI, 825).

Kleiner and Corfield: No grounding; cross-connection piping (R. II, 337-341).

de Bussieres: No grounding; cross-connection piping (R. II, 491-493).

Benezra: Improper grounding; cross-connection piping; mixed treated and untreated water (CX 35, R. VI, 906; R. II, 576).

Albrook, Adams, Wagner and Flay:

The laboratory installation: No grounding; cross-connection piping (CX 36, R. VI, 908).

The dishwasher installation: No grounding; cross-connection piping, including a by-pass (CX 37, R. VI, 911); unit installed on hot water line (R. II, 542, 604).

The hot water tank at Caravan Inn: No grounding; cross-connection piping, including a by-pass (CX 38, R. VI, 914).

The coffee urns on Washington State campus: No grounding (R. II, 509-510).

Weast: Improper grounding; cross-connection piping (CX 50, R. VI, 944).

Hoffman: Improper grounding; cross-connection piping (R. III, 1121, 1122, 1132, 1259).

Johnson and Gildea: Cross-connection piping (R. V, 3887, 3891); no provision for "blow-down" (CX 8, R. VI, 837; CX 31, R. VI, 899; CX 34, R. VI, 1012; CX 58, R. VI, 1024).

Hereafter in our argument (pp. 74-78, infra) we discuss the Commission's attempted justification of the failure of these experts to follow the manufacturers' instructions in performing their tests.

D. Theory of water treatment.

Mr. Wells does not know why his unit affects water as it does (R. II, 416). He testified that the results had been obtained empirically after long experimentation (R. II, 416). He further testified that his unit is specially processed to affect the crystals in the metal and contains inclusions not ordinarily found in cast iron and bronze (R. II, 425). But he refused to reveal the process by which this is accomplished (R. II, 426). He has applied for a patent on this process, which required, of course, a full disclosure to the Patent Office (R. II, 413-414). On the advice of counsel, however, he refused to make a public disclosure to the Commission, which would have immediately lost to him all of the value of his invention unless and until a patent issues (R. II, 426).

While the record does not disclose why the Evis unit works—since this is unknown—it does disclose significant parallels in water treatment which give full credence to the inventor's claims and wholly discredit the Commission's arbitrary and unsupported order.

Petitioners' witness O'Connell, one of the nation's most distinguished experts and consultants in the field of water

uses and control (R. IV, 2956-2960), generally discussed the problems in that field. He pointed out that through the years not one form of water treatment has "originated in the laboratory" (R. IV, 2992). Each has developed from experimentation in actual operations. He emphasized that the efficacy of water treatments cannot be determined in a laboratory. He illustrated from his own experience (in collaboration with other distinguished workers in the field) that efforts to test water treatments in the laboratory were unsatisfactory because "they were totally unable to duplicate the conditions * * *. [The] experimental approach was not conclusive because we did not succeed in using the same water velocity and the same operating conditions in the tubes" (R. IV, 2991). Among the reasons for laboratory inadequacy is (R. IV, 2992):

> "The concentrations of the material which we were dealing with are so small, and in the case of the treatment of surface waters so relatively variable that it is almost impossible to duplicate in a laboratory field conditions."

In addition, Mr. O'Connell pointed out that virtually every treatment for water has been greeted with skepticism, and that many when introduced have been considered worthless and scientifically "impossible" under the knowledge of the day.

As an example, Mr. O'Connell discussed (R. IV, 2997 et seq.) the cathodic method of water treatment which was first suggested by Sir Humphry Davy in 1824 who believed that the hulls of vessels could be protected from corrosion by affixing pieces of zinc to their copper sheathing. The Encyclopaedia Britannica still records the rejection of this

device by the Lords of the Admiralty.[46] And yet today this method of protection, still only partially understood, is widely used. The method consists essentially of adding to the metal already present in the water system, another metal high on the galvanic series, such as zinc or—now more commonly—magnesium. Corrosion is the result of electrical action between two metals of different potentials (R. III, 1010, 1021). Such differences may exist within a single casting (R. III, 1010, 1011). The cathodic treatment consists of placing an anode of a chemically more active metal (the zinc plates of Sir Humphry) within the water system, so that electrolysis is reversed and, instead of corrosion occurring on the permanent surfaces of the system, the anode itself—appropriately known as the "sacrificial anode"—is gradually disintegrated by the electrical action within the water. When it was suggested, even in recent times, that the mere attaching of pieces of zinc to the stern post of vessels would prevent the hull from corroding, those who advocated this treatment "were certainly held in bad repute * * * by most of the people working in the field" (R. IV, 2997). And yet today this method protects metal from the corrosive effects of water from the family water heater to the locks of the Panama Canal.[47]

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[46]Enc.Brit., Vol. 7, p. 89.

[47]A recent article in Business Week tells part of this story, which is now in the realm of public knowledge:

> "Tremendous advances have been made in controlling corrosion and its stupendous cost in recent years. Researchers, seeking better ways to protect metal surfaces, have unearthed properties and habits of ferrous metals that would have been

Cathodic protection may also be achieved by introducing into the water system weak outside currents which have the effect of retarding the natural corrosive action produced by the electrolysis constantly occurring within the system. Experiments have shown that widely differing results are obtained in different physical environments. As Mr. O'Connell pointed out (R. IV, 2999-3000):

> "In the case of pipe lines the situation is even more extreme than that. There is one pipe line in California where about 30 miles of pipe line appear to be quite adequately protected with the use of a half an ampere at 10 volts. There is another pipe line of

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beyond the wildest dreams of the corrosion engineer 25 years ago.

But the annual loss to corrosion is still staggering, despite the advances. * * *

* * * The toll of corrosion is especially alarming in the light of the rate with which the U.S. is using up its reserves of base metals * * * Nobody worries more than the scientists who are trying to find the root causes of corrosion * * * But the basic factors remain elusive—as they are in so many common phenomena. The whys of corrosion won't be found until much more is learned about matter—the interaction of atoms and molecules, the roles of electricity and magnetism.

* * * * *

Best known of all types of corrosion are the ordinary rusting of iron in the presence of water and oxygen, and galvanic—or electrochemical—corrosion, which takes place when two metals come in contact with each other in the same water or chemical solution. Here, an electric current is set up that causes the rapid corrosion of the more chemically active of the two metals.

Physicists can demonstrate that the more chemically active metal becomes an anode, the less active a cathode, with the two setting up the electrochemical process that causes the corrosion. What they can't understand is why some metals, such as silver, are relatively inactive chemically, while others, such as magnesium, are relatively active.

There are other situations that shape up as causes of corrosion too, which serve to complicate any theories concerning it. Take the so-called concentration cell corrosion, which occurs when a metal comes in contact with two different

about 50 miles in length where they are presently using twelve 100 ampere generators to produce—well, it would be 1200 amperes at about 25 volts and the protection is by far not satisfactory due to the inadequacies of the original pipe installation."

Another form of the treatment of water with metal is as ancient as our legends. The Bible and the early Egyptian writings record the purification of water by storing it in silver and copper vessels.[48] It was not until 1915, that any theory attempting to explain this phenomenon was advanced. It is still not understood and

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liquids. Researchers are not convinced that this is just another type of galvanic corrosion; they won't accept that obvious explanation until they know just what is going on in both the liquids and the metals at a molecular, atomic, and sub-atomic level.

* * * It is in the practical coping with corrosion that researchers are making their best progress, rather than in dissecting the theory of its ravages. * * *

Another big, practical help for industry is the sacrificial anode, used to protect everything from the family hot water heater to the hulls of ships and the locks of the Panama Canal. Sacrificial anodes are usually made of magnesium, a metal that is high on the galvanic series, and so serve to protect less chemically active metals like iron and steel from the damage of electrochemical corrosion. The anodes suffer the damage themselves, and can be replaced when deterioration has reached a point when they can no longer protect the other metal.

* * * * *

For decades, engineers have been working to precondition boiler water, the ideal target being water that is only slightly alkaline, and contains no dissolved solids or free oxygen. To control acidity, they have resorted to chemicals. * * *

* * * * *

* * * all these anti-corrosion measures have been leaning on the empirical—to observed knowledge of what corrosion does rather than the abstraction of why it does it * * *" (Business Week, Nov. 10, 1956, pp. 136, 138).

[48]From this practice, incidentally, springs the amiable custom of the gift of a silver cup by godfathers (R. IV, 2995).

is presently being explored extensively at the California Institute of Technology (R. IV, 2995).

That the behavior of water may be affected physically by metal, as well as chemically by chemical treatment, was recognized by Commission witness Weast (R. III, 1047-1048):

> "Is it also possible, in your opinion, Doctor, * * * that * * * there may be ways of preventing that corrosion from taking place, * * * by the addition of a third material of some type * * * ?
>
> A. This type of corrosion is controlled by the addition of chemicals which will tie up those ions which might be deposited on the iron to form galvanic cells on the iron.
>
> Q. Now, you are thinking there of the type of chemical treatment of water, as for example, where certain chemicals, phosphates or something of that kind, are actually put into the water in solution in the water?
>
> A. Yes.
>
> Q. Now, turning from that type of treatment, do you know, or do you have any opinion as to whether or not the same type of treatment might be brought about through the use of a metal that would simply, at some point in this water system of ours, be brought into contact with the water, so that you now had, instead of two metals in the water, you had three?
>
> A. Yes * * * This is a possibility."

And the same witness, in commenting on the cathodic method of water treatment, was asked whether it was not true that in the earlier stages of the cathodic method of water treatment there were many "disbelievers" who

thought that it simply could not work, he agreed, but added (R. III, 1050):

> "A. Certainly, but may I reiterate. I think that if an individual of the early period of the cathodic protection has started out to attempt to make cathodic protection work, it would have worked for him."

This, of course, is the exact parallel of the situation here presented.

The record in this case discloses another exceptional development in the field of water treatment which was discovered accidentally in field practice and has no explanation under the principles of known science:

Some years ago Shell Chemical Company introduced on the Pacific Coast the fertilization of crops by supplying anhydrous ammonia in irrigation water. Immediately problems arose because of the deposit of scale on the tubes in the irrigation ditches. Dr. Rosenstein, chief chemist of Shell Chemical Company, being familiar with the chemical treatment of water, prepared a chemical which was sold as "Rose Stone." This chemical reacted with the anhydrous ammonia and prevented the formation of scale. The farmers were directed to use it in amounts that were known to be correct according to stoichiometric reactions. (This is a chemist's way of saying 2 plus 2 equals 4, R. IV, 3003). "Rose Stone" was expensive. Farmers began to "fudge" and cut back on the amounts used. Finally they were using one-tenth or less of the amounts theoretically necessary to produce nonscaling. And yet there was no change in the results (R. IV, 3001-3003). Thus, by accident, it was discovered that in cold

water systems the deposition of calcium and magnesium can be controlled by an amount of hexametaphosphate that cannot possibly be in complete reaction with the calcium and magnesium (R. IV, 3003). A theory to explain this phenomenon has not yet been found (R. 3003). The quantities of "neutralizing" chemical introduced into the water are so minute that they do not change anything that a normal chemical analysis of the water would disclose. Yet, in some way, deposition of the calcium and magnesium is prevented (R. IV, 3040) "* * * the physical state in which the calcium and magnesium are present [is changed] by a mechanism of which we have no further knowledge than we do of the true mechanism of the ion exchange" (R. IV, 3049). That the treatment does not "follow" the laws of chemistry was noted by Commission witness Weast (R. III, 1053):

> "A. Well, this is in the threshold treatment of water with hexametaphosphate, where the stoichiometric amount of hexametaphosphate required to prevent the precipitation of calcium carbonate does not follow the laws of chemistry which involve prime valence forces."

Another type of water treatment which developed from practical use, was ridiculed by scientists, and which preceded any theoretical explanation, was the custom of the old Scotch marine engineers to throw "sugar or starch or tannin into their boilers and they didn't particularly know why except they had less trouble" (R. IV, 2994). When in the early 1920's the chemists discovered that boiler water problems were aided by chemical reactions, and the phosphate and hot lime soda treatments developed, the chem-

ists "were extremely critical of the Scotch marine engineers who threw cactus juice, for example, and tannin and all these things into their boilers" (R. IV, 2994). It was not until 1935 that science began to appreciate that scaling in boilers could be lessened not only by a chemical change in the water but by a dispersing of the solids into a minutely smaller or "colloidal" form, and that the Scotch engineers by accident had discovered certain materials which did not produce the conventional chemical reaction but did have a colloidal effect upon the water (R. IV, 2994-2995).

A further recent development in water treatment is the use of ion-exchange material (R. IV, 2986-2988, 2989), another process discovered from practical experimentation and not in the laboratory. It was observed that as water came off certain soils it had a substantially different mineral character. This led to the discovery of the so-called green sands found in these soils. These sands, now used in the ion-exchange treatment have the property of absorbing certain ions in water. Without any reaction, the ions in the water are "simply held on the surface [of the sands] by a mechanism that is not yet thoroughly understood and then they can be displaced from that material by a process of reversing the chemical system" (R. IV, 2986). The water to be treated flows over the green sands until they have been covered by the attracted ions. At this point they lose their effectiveness and are "regenerated" by "washing" their surface with a "reversing process." The treatment is "probably a physical process more than a chemical process" (R. IV, 2986) and "The mechanism by which the exchange takes place is not established to the

general agreement of all of the people working in the field" (R. IV, 2987).

It was a careful consideration of all of this testimony, as well as of all the other evidence in this case, which led the Hearing Examiner to approach his decision with mature restraint (R. I, 731-732):

> "It appears, on the one hand, that we may be here concerned with a worthless gadget, while, on the other, we may be here confronted with the first practical application of a device operating upon a principle heretofore unrecognized by present-day science. In the presence of such a possibility, justice to the Respondents as well as to the public interest requires that we approach with caution the issuance of a cease-and-desist order which might well mean the economic destruction of the Respondents and the consequent loss of their device."

E. The decisions below.

1. The decisions of the Hearing Examiner.

Over the course of four years the Hearing Examiner took testimony in this case. He heard the witnesses. He appraised the exhibits as each was introduced, explained and tested on cross-examination. He became versed in the technical aspects of the case, which at times were highly complex. As no other person possibly could, he judged the credibility of the witnesses and weighed the evidence. In his final decision (R. I, 692-732) he reviewed each charge of the complaint and meticulously analyzed the testimony with respect to each. He concluded (R. I, 730-731):

"Counsel supporting the complaint criticizes all the user testimony presented by Respondents, on the theory that user witnesses are not qualified to determine the value or lack of value of the Evis Water Conditioner. Although the formally-educated witnesses possess a background of knowledge in their fields of specialty, and are trained to observe and to cross-examine their observations with greater skill than others not so trained, we believe that any intelligent person with an open and honest mind, who is capable of faithful observance of details, might successfully and fairly test the operation of the Evis Water Conditioner. Furthermore, it may be true that the practical engineer, uninfluenced by preconceived scientific theory, might more readily observe an unorthodox and unprecedented phenomenon which the formally-trained scientist might tend to reject categorically. The testimony of a number of the witnesses holding Doctor of Philosophy degrees illustrates, in this record, such a tendency. Be that, however, as it may, the witnesses for the Respondents were not all scientifically untrained. They varied from college graduates holding engineering degrees from accredited schools to persons possessing only a minimum of formal education. As a group, however, they created the impression that they were testifying to honest convictions.

* * * * *

* * * Considered in its entirety, the evidence presented on behalf of the Respondents is, to say the least, impressive."

2. The decision of the Commission.

In contrast to the decisions of the Hearing Examiner, the decision of the Commission distorts and ridicules the claims of petitioners; accepts, with superficial, erroneous

and uncritical analyses, the testimony of every expert who testified for the Commission, although either the experts or their tests were thoroughly discredited at the trial; dismisses, with an amazing misstatement of the record, the failure of the Commission's experts to install and operate the Evis unit in accordance with the manufacturer's instructions; and summarily dismisses the testimony of petitioners' witnesses as that of "a number of users" who "believed" that they obtained beneficial results from the use of the Evis unit (R. I, 816).

SPECIFICATIONS OF ERROR

The Commission erred:

1. In finding that the record contains reliable, probative and substantial evidence supporting the allegations of the complaint, for the reason that said finding is without support in the record. The only reliable, probative and substantial evidence disproves the allegations of the complaint and establishes the merit of the Evis Water Conditioner.

2. In finding that the Evis Water Conditioner will not perform as represented by petitioners, for the reason that said finding is not supported by the evidence.

3. In finding that petitioners' statements and representations, as alleged in the complaint or otherwise, are false, misleading or deceptive, for the reason that said finding is not supported by the evidence.

4. In finding, in the absence of any evidence, that the use by petitioners of the statements and representations,

alleged in the complaint or otherwise, has had the tendency or capacity to mislead a substantial or any portion of the purchasing public because of an erroneous and mistaken belief as to the truth of such statements and representations.

5. In finding, in the absence of any evidence, that as a result of the use by petitioners of the statements and representations, alleged in the complaint or otherwise, injury has been done to competition in commerce among and between the various states of the United States and in the District of Columbia.

6. In concluding, in the absence of any justification in the record, that all or any of the acts and practices of petitioners, as found by the Commission or otherwise, have been to the prejudice and injury of the public or of the competitors of petitioners, or have constituted unfair methods of competition or unfair or deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

7. In finding that petitioners have represented, either directly or by implication, that in its use and operation the Evis Water Conditioner will cause water to become "soft" or "softer" as these terms are commonly used to connote the removal or conversion of natural minerals in water. The record shows that for a considerable period of time prior to the filing of the complaint, petitioners' advertising media consistently stated that the product is not a water softener and that it neither adds nor eliminates natural minerals in the water.

8. In including in its order items of performance taken from paragraph 6 of the complaint with respect to which

no evidence of any kind was offered as to the performance of the Evis unit.

9. In disregarding and dismissing the uncontradicted testimony of 92 witnesses offered by petitioners, who were with few exceptions licensed or experienced professional operating engineers, who testified to the merit, value and utility of the Evis Water Conditioner when used in practical installations under the conditions and for the purposes for which it was designed and sold.

10. In ruling that the uncontradicted testimony of actual users of the product was of little or no probative value in this case and in holding that the only evidence entitled to be given weight was the "scientific" opinions of the Commission witnesses.

11. In dismissing as "of little, if any, significance," the scientific testimony presented by petitioners.

12. In drawing a sharp distinction between its own witnesses, whom it self-servingly calls "experts," and petitioners' witnesses, referred to by the Commission as "users"; examination of the record clearly demonstrates that the petitioners' witnesses are the real experts in this proceeding and that their testimony is of great significance.

13. In attributing probative value to the testimony of Commission witnesses notwithstanding that they failed to test the product for the purposes for which it was sold and/or failed to test it under the conditions for which it was intended to be used.

14. In attributing probative value to purported tests of the Evis Water Conditioner conducted by Commission

witnesses, notwithstanding the fact that such witnesses ignored, failed to comply with, or refused to follow, the instructions of petitioners for the proper installation and use of the product.

15. In attributing probative value to tests conducted by Commission witnesses to determine whether the Evis Water Conditioner effects a chemical change in water, notwithstanding the undisputed fact that petitioners make no such representation for the product and that their advertising literature and instructions for the use of the product specifically disclaim such a change, and further in attributing any probative weight to such witnesses' opinions based upon such tests.

16. In giving weight and credence to the opinion testimony of Commission witnesses on the basis of their education, training and general experience and in disregard of the absence of any foundation for such opinions based upon tests or experience with the product under the operating conditions for which it was sold.

17. In holding that, on the issue of the merit and utility of the product, contrived laboratory experiments conducted without regard to the purposes for which the product was sold, the normal operating conditions under which it is used, and in violation of the manufacturer's instructions for installation and use of the product, were controlling; whereas undisputed evidence of the successful use of the product and utility in practical installations was to be disregarded.

18. In drawing conclusions from the opinions of Commission witnesses which conclusions such witnesses themselves specifically refused to draw.

19. In disregarding admissions of the Commission witnesses:

(a) That they would not discount or deny the value or utility of a product merely because they did not know or understand its scientific principle;

(b) That their own tests were not designed nor intended to determine the value or utility of the product when used in practical installations under normal operating conditions;

(c) That they disregarded, ignored or refused to follow the petitioners' instructions for the installation and use of the product and in some instances purposefully violated such instructions; and/or

(d) That they performed tests for uses and/or effects of the product not claimed and in fact disclaimed by petitioners, but nevertheless based their opinions upon such tests.

20. In holding that petitioners' refusal to make a public disclosure of their secret process was to be construed as confirmation of the allegations of the complaint.

21. In construing the record as though it contained the evidence of 3,000 unsuccessful performances of the Evis Water Conditioner.

22. In adopting and applying to this proceeding an erroneous principle, namely, that if scientists called as Commission witnesses are unable to offer any scientific theory or explanation for the operation of a newly discovered product, such inability establishes the lack of utility of the product and is controlling in the face of undisputed and overwhelming evidence of its successful

use in practical installations under normal operating conditions.

23. In holding as a matter of law that user testimony has little or no probative value and therefore may be disregarded unless "there is scientific evidence of considerable weight on both sides of the question."

24. In failing to give due weight to the two Initial Decisions of the Hearing Examiner, who heard and saw the witnesses and who had the better opportunity to evaluate the testimony and the issues of the case; the Commission erred in vacating the first and second Initial Decisions of the Hearing Examiner by reason of the fact that said Initial Decisions are supported by and were in accordance with both the evidence and the law.

ARGUMENT.

A. THE COMMISSION ERRED IN GIVING CONCLUSIVE EFFECT TO THE TESTIMONY OF THE COMMISSION'S EXPERTS, IN GIVING NO EFFECT TO THE UNCONTRADICTED TESTIMONY OF THE SUCCESSFUL PERFORMANCE OF THE EVIS UNIT IN ACTUAL OPERATION, AND IN HOLDING THAT RELIABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE SUPPORTS THE CHARGES THAT THE EVIS WATER CONDITIONER WILL NOT PERFORM AS CLAIMED.

Earlier in this brief we have reviewed the testimony of petitioners' witnesses, most of them experts in the field of water uses. Trained, intelligent, credible men, they testified to physical facts, objectively observable. On the issue of scale, for example, their testimony establishes as a plain, indisputable, physical fact that the Evis unit actually does remove and prevent scale when used in the practical operations for which it is intended and for which

it is sold. This physical fact is not changed by the testimony of Mr. Merrell who trickled water in a laboratory through an eight inch length of pipe (supra, p. 38), the testimony of Dr. Hoffman, who trickled water in a laboratory through a two and one half inch length of pipe (supra, p. 40), or the testimony of Dr. Weast who experimented with high oxygen content water on pipe largely encrusted with rust (supra, p. 38). By the same token, the testimony of these witnesses is not, we submit, substantial evidence that the Evis unit cannot and does not remove scale.

The Commission ignores the testimony of the many witnesses who saw and used the Evis unit. In a few lines (R. I, 815-816) it brushes it aside as that of "a number of users" who "believed" that they obtained beneficial results but who did not make their observations "under scientifically controlled conditions." It turns to the opinions of the experts and finds in them substantial evidence that that which did occur could not occur. To the Commission the fact that Dr. Wagner finds from his infrared spectro-analyses that the Evis unit produces no "alteration in the molecular structure, the geometric configuration of the molecules" in water (R. I, 813), the fact that Mr. de Bussieres, "a chemical engineer of long experience" who was interested in the " 'dielectric constant,' a measure of the internal molecular structure of a substance," found that the water had not changed in certain characteristics which "might change if the dielectric constant changed" (R. I, 810),[48] conclusively establishes that

[48]The Commission does not point out, in appraising the relevance of these tests, that Mr. de Bussieres testified that changes

Mr. Durst, a graduate engineer with years of experience in water-using operations, did not see scale actually removed by the Evis unit in the equipment on his drilling rigs (supra, pp. 17-18). By the same reasoning, to use Mr. Durst's whimsical simile, the Commission should hold that a bumblebee is earthbound, because "aerodynamically he can't fly" (supra, p. 18). [49]

Without discrimination, without analysis, the decision of the Commission names one after another the so-called experts called by the Commission, lists their titles, quotes their opinions and accords those opinions conclusive weight. For example, Dr. Albrook and Dr. Adams become "Director of Industrial Research, Washington State College," and "a research chemist of the same institution" who conducted tests which "failed to show that the Evis water conditioner was of any value." No mention is made of the more than two hundred pages of cross-examination which literally destroyed the credibility of these witnesses and led the Hearing Examiner to make findings as severe, perhaps, as could be directed against men of their profession, finding their testimony "evasive" and unworthy of belief (R. I, 718-719).

Heretofore in this brief we have discussed all of the Commission's experts. We wish to elaborate upon just

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in the molecular structure of substances are currently being brought about "by exposure to cyclotrons, etc., and atomic rearrangements" (R. II, 490); that a rearrangement in the molecular structure of water "could not be made without subjecting it to some tremendous forces" (R. II, 491).

[49]Actually such a holding would be no more startling than the Commission's statement in its opinion that the turbulent water in a washing machine is not to be considered in a dynamic state because it is "static in the sense that it is not moving through a pipe" (R. I, 813).

one instance because of the exceptional importance of the issue of prevention and removal of scale in this case.

In its opinion the Commission says (R. I, 811):

> "* * * extensive testing of the Evis Water Conditioner was undertaken by the Engineering Experiment Station of the University of Virginia. Dr. Lewis B. Johnson, Jr., and Dr. Robert Gildea, who worked on and were responsible for these experiments, both testified, in substance, that the Evis unit will not alter the characteristics of water and that it will not produce the beneficial effects claimed for it. The evidence so adduced clearly confirms the scientific showing made prior to the remand."

As a matter af fact the "evidence so adduced" does not clearly or at all confirm any charge of the complaint.

These experts were requested by the Commission to determine whether the Evis unit would prevent and remove scale. To appraise their tests a few practical facts may be recalled.

A boiler or evaporator is, of course, a device in which water is converted by heat into steam. As the steam is drawn off the water supply is continuously replenished. The steam removes none of the solids and, as their concentration in the boiler water increases, they precipitate on the hot walls. To prevent or minimize this precipitation the solids are removed by "blow-downs," which consist simply of draining off all or a portion of the water from time to time. Continuous blow-downs, usually every few hours,[50] are essential.

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[50]Evaporators and boilers are blown down every three hours (Samuel R. Morris, Chief Engineer, Transoceanic Marine Corpo-

The function of a water conditioner is not to make solids disappear—a physical impossibility. Its function is to keep the solids in such a state that they do not adhere to the boiler or evaporator walls and will be removed by the blow-downs.

Let us turn now to the "tests" which Drs. Johnson and Gildea devised to determine whether the Evis unit will prevent or remove scale.

Dr. Johnson took five one-gallon laboratory stills, capable of evaporating one gallon per hour, and operated them as follows: The stills were each filled with well water from the nearby Blandy Farm, a hard water containing 200 parts per million of dissolved solids (CX 64, R. VI, 1006). Each still had a continuous feed of water so that as the steam boiled off, the water in the still remained at a constant level. The water feed was so arranged that water from the still, with its accumulating solids, could not escape (R. V, 3798, 3842, 3843, 3845, 3859, 3880, 3881). Four stills were fed with Evis treated water; one with untreated water. The heat was turned on the stills and they were left to boil continuously, from week to week, for ten weeks. Each week Dr. Johnson

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ration, marine evaporators, R. IV, 2644-2647) or every four hours (Alexander MacKenzie, Chief Engineer, United Fruit Company, marine evaporators, R. IV, 3175; Denzel R. Carpenter, Chief Engineer, United Fruit Company, marine evaporators, RX 56, R. VI, 1077), or every eight hours (Ellis J. Shane, Engineer, American Rock Wool Corporation, Tacoma, Washington, boiler, R. IV, 3086), or every twelve hours (George D. Bowersock, Chief Engineer, Pope & Talbot, Inc., marine evaporators, RX 58, R. VI, 1142), or, with treated water, sometimes only every twenty-four hours (Lawrence L. Sligh, Chief Engineer, Bridgford Packing Company, boilers, R. III, 1922-1923).

disconnected the stills, emptied the water, rinsed out the stills, air dried the solids that had adhered to the walls, and weighed the stills. The stills were then reconnected and the same procedure followed during the next week. At the end of the experiment Dr. Johnson found that solids had accumulated in all five stills at approximately the same rate (CX 64, R. VI, 987-988). During each full week of the entire ten weeks of the experiment the drain cocks or "blow-down valves" of the stills were never opened. This procedure is to be compared with that followed in operating an industrial marine evaporator:

> "[Q.] * * * please state how often the evaporator was blown down in normal operations, and describe in detail the method used.
>
> A. Well, that was blown down about every four hours. And the method used is a—build up a steam pressure and open the bottom blow valve, the blow down valve until it was blown out. Then we would fill it up again with fresh water" (testimony of Denzel R. Carpenter, Chief Engineer, United Fruit Company, RX 56, R. VI, 1077-1078).

A simple calculation shows that, at the end of the first week, Dr. Johnson's stills contained, in dissolved or undissolved form, concentrations of 33,600 parts per million of solids.[51] Each week, the same amount of solids was added. Each week—except for the minute amount suspended in the one gallon of water drained out—these solids simply accumulated on the walls of the stills. The

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[51]One gallon per hour, times 24 hours, times seven days, times 200 parts per million of solids in the Blandy Farm water ($1 \times 24 \times 7 \times 200 = 33{,}600$).

"test" was the same as though a housewife had boiled a one-gallon teakettle dry every hour for 10 weeks and then weighed the accumulated solids.

Further, the concentration of silica built up in the stills far exceeded the limits prescribed by petitioners for the effectiveness of the Evis unit, i.e., 60 parts per million (CX 31, R. VI, 897). Dr. Johnson's analysis (CX 64, R. VI, 1006) of Blandy Farm water showed that it contained 10.7 parts per million of silica. Thus each week he put into each still 1797.6 parts of silica.

And further, the solids on the walls of the stills were not scale at all. The Hearing Examiner described them as "soft chalky material" which "gives way on pressure of my fingernail" (R. V, 3833).

Dr. Johnson's test for "removal of scale" was even more extraordinary. Here again he used a one-gallon per hour still, but this time one that was "badly scaled." He boiled this still continuously for two-week periods, with no blow-down for ten weeks (R. V, 3795). Thus the still accumulated, each two weeks, a concentration of 67,-200 parts of solids, including 3,600 parts of silica (CX 64, R. VI, 1006). The concentration of silica alone, during each two-week period, was 60 times higher than the maximum permissible limit set in petitioners' instructions (CX 31, R. VI, 897). At the end of each two-week period Dr. Johnson weighed the still, and found it heavier.

Counsel for the Commission had recognized the requirements for blow-down in his instructions to these witnesses. Dr. Johnson's workbook (RX 59, R. VI, 1162; 2-11/6168-1,

pp. 61-63) outlines the procedures prescribed for him. One was:

"4. Blow-down will be carried out on each still."

Dr. Johnson's superior, Mr. Gildea, testified that he did not know why the blow-down requirement was not carried out (R. V, 3981-3982). Dr. Johnson knew nothing about the operation of a boiler (R. V, 3853, 3876). Neither Dr. Johnson nor Mr. Gildea had any knowledge of the permissible maximum concentrations prescribed by the American Boiler Manufacturers Association (R. V, 3860, 3976). Neither had any knowledge of the maximum concentrations which can be allowed to accumulate in the normal operation of a low pressure boiler or evaporator (R. V, 3860, 3976). Dr. Johnson knew nothing about the means of computing a blow-down percentage necessary to control concentrations based upon total solids or the type of solids in the water being used (R. V, 3854). He finally said (R. V, 3870) "I don't know what blow-down means." The Hearing Examiner added (R. V, 3876):

"Let's depart from boilers since he said he doesn't know anything about them."

These are the tests which the Commission finds "clearly [confirm] the scientific showing" (R. I, 811) that the Evis unit will not remove or prevent scale.

The basic error of the Commission, of course, is that it is seeking to apply to this case the principle that "user testimonials" in the patent medicine field do not furnish substantial evidence as against credible expert opinion. These cases recently have been examined by this Court (*Carter Products, Inc. v. Federal Trade Commission* (9

Cir. 1959) 268 F.2d 461). But the witnesses in this case are not women who, Eve-like, see in the mirror a rejuvenation of fading skin by the cream of Charles of the Ritz,[52] or witnesses who find virtue in patent medicines for hair and scalp,[53] or rheumatism,[54] or cancer, leprosy and malaria,[55] or in medical appliances.[56] In sum, they are not " 'that vast multitude which includes the ignorant, the unthinking and the credulous.' "[57] On the contrary, they are the true experts in this case.

B. THE COMMISSION ERRED IN FAILING TO GIVE DUE WEIGHT TO THE DECISIONS OF THE HEARING EXAMINER WHO HEARD AND SAW THE WITNESSES AND HAD THE BETTER OPPORTUNITY TO EVALUATE THEIR TESTIMONY. HIS DECISIONS DEMONSTRATE THE LACK OF MERIT IN THE COMMISSION'S CASE AND THIS COURT, ON REVIEW, SHOULD ACCORD TO THEM THE WEIGHT TO WHICH THEY ARE ENTITLED.

The Hearing Examiner "lived" with this case for nearly four years, heard the testimony of 124 witnesses and appraised their credibility under rigorous cross-examination. His initial decisions meticulously analyze the evidence and reflect his familiarity with each witness and his testimony. The cursory and uncritical rejection of his find-

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[52]*Charles of the Ritz Dist. Corp. v. Federal Trade Com'n* (2 Cir. 1944) 143 F.2d 676.

[53]*United States v. 50¾ Dozen Bottles, etc.* (W.D.Mo. 1944) 54 F.Supp. 759.

[54]*Rhodes Pharmacal Co., Inc. et al.* (1952) 49 F.T.C. 263, 284.

[55]*Koch Laboratories, Inc. et al.* (1951) 48 F.T.C. 234, 249.

[56]*The Dobbs Truss Co., Inc., et al.* (1952) 48 F.T.C. 1090, 1113 [Docket No. 5808].

[57]*Charles of the Ritz Dist. Corp. v. Federal Trade Com'n* (2 Cir. 1944) 143 F.2d 676, 679.

ings and conclusions by the Commission was, we submit, erroneous and this Court should accord to them the weight that reasonably they command.

It is now settled (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 497) that the initial decision of the Hearing Examiner is an integral part of the record and that the reviewing court "should accord the findings of the trial examiner the relevance that they reasonably command."[58]

In the *Universal Camera* case the Supreme Court held (340 U.S. at pp. 493-494, 496):

> "* * * the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report. The conclusion is confirmed by the indications in the legislative history that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform.
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> * * * The findings of the examiner are to be considered along with the consistency and inherent probability of testimony."

This rule has often been applied. Thus in *Minneapolis-Honeywell Reg. Co. v. Federal Trade Com'n* (7 Cir. 1951) 191 F.2d 786, the court held (pp. 789-790):

> "Under the rule of Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 496, 71 S.Ct. 456, 469, it is the duty of this court to examine

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[58]This principle and others affecting judicial review have recently been considered by this Court in *Carter Products, Inc. v. Federal Trade Commission* (June 19, 1959) 268 F.2d 461.

the record as a whole, including the report of the examiner, in order to determine whether the evidence supporting the Commission's order is substantial. * * *

* * * * *

* * * And while the findings of an examiner are not 'as unassailable as a master's * * *' where it appears from the record that they are supported by a preponderance of the evidence, the action of the Commission in rejecting them is arbitrary."

And in *Ohio Associated Tel. Co. v. National Labor Relations Bd.* (6 Cir. 1951) 192 F.2d 664, the court stated (p. 668):

"In view of the fact that the examiner heard and saw the witnesses, and the Board did not, it is pertinent to inquire into the relative weight to be given by a reviewing Court to the findings of examiner and Board. * * * an examiner's findings are not to be given such finality as is accorded to the findings of a Master or District Judge sitting without a jury, and so to be accepted unless clearly erroneous * * * [But] It would seem * * * in giving consideration to the whole record, as now we are obliged to do, we may not disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility, and so for ascertaining the truth."

To the same effect, see:

National Labor Relations Board v. Dinion Coil Co. (2 Cir. 1952) 201 F.2d 484;

United States Steel Co. v. Rel. Bd. (7 Cir. 1952) 196 F.2d 459, 467;

Folds v. Federal Trade Commission (7 Cir. 1951) 187 F.2d 658, 660, 661.

This case emphasizes, as few others could, the essential role these principles play in the administration of justice. The Hearing Examiner sat in eleven different cities to hear and see the witnesses. The credibility of these witnesses was sharply tested by the cross-examination of both counsel for petitioners and counsel for the Commission. Only confrontation of these witnesses by the trier of the facts could disclose the bias and prejudice which rendered certain testimony unworthy of belief (supra, p. 27); the tendency of other "witnesses holding Doctor of Philosophy degrees" "to reject categorically" "unorthodox and unprecedented phenomena" which a "practical engineer, uninfluenced by preconceived scientific theory, might more readily observe" (supra, p. 57); the "impressive" character of the testimony of those who had seen and used the Evis unit in practical operations (supra, p. 57).

C. THE COMMISSION ERRED IN GIVING WEIGHT TO EXPERIMENTS PERFORMED BY EXPERTS WHOSE INSTALLATIONS WERE NOT MADE IN ACCORDANCE WITH THE MANUFACTURER'S INSTRUCTIONS.

We have noted above the failure of each of the Commission's expert witnesses, save one, to follow the manufacturer's instructions in installing the units with which they experimented (supra, pp. 44 to 47). The Commission recognized that "Manufacturers' instructions should be followed, of course, to achieve the results claimed for a product" (R. I, 811). But it held that the failure to follow instructions in this case did not affect the weight of the tests because (R. I, 811):

"[1] in this case the 'instructions' have varied from time to time and [2] apparently are not all contained in any one document. * * * [3] Moreover, respondents' witnesses who * * * claimed beneficial results, admitted in many instances that no particular instructions were followed. Also, [4] respondents in their literature suggest that Evis treated water can be procured simply by running tap water through the Evis Water Conditioner, the implication being that an elaborate hookup is not essential. [5] In addition, certain of the expert witnesses * * * testified that failure to follow detailed instructions would have made no difference in the results. * * * [6] the admission of Mr. Wells * * * that he had no scientific principle to explain the claimed effect of the Evis device, places on the respondents some burden of showing the necessity for the detailed instructions, and no such showing was made."

Here again, in marked contrast to the Hearing Examiner, the Commission reveals its total unfamiliarity with the record. Directly contrary to its statement that "no showing was made" by petitioners of the necessity for the "detailed instructions,"[59] extensive testimony was directed to each of the points referred to by the Commission (supra, pp. 42-44).

As we have pointed out earlier in this brief (supra, pp. 42-44), the changes in petitioners' instructions added cer-

[59]These "detailed instructions" were (1) directions for the appropriate grounding of the water system; a direction (2) not to mix treated and untreated water or (3) to take water from a connected set of pipes in making tests, and (4) a direction to use familiar blow-down procedures in tests for scale. It would be hard to conceive of a more understandable and reasonable set of instructions.

tain directions, notably the requirement of grounding the water system, which experience had shown improved the performance of the unit. The fact that the first instructions merely directed that the unit be fitted into the water line, and that many such installations were successful (see pp. 42 to 44, supra), obviously carries no implication that the later instructions for grounding were not essential to obtain any results in many cases, and to obtain maximum results in all. As we have pointed out (supra, pp. 42-44) it is well known that stray electrical currents affect the action of water. And certainly the importance of following the instructions after observation had shown that electrical currents adversely affected the treatment was not lessened, as the Commission suggests, by the fact that petitioners did not know why they affected it.

A further basis for the Commission's ruling that its experts could disregard the manufacturer's instructions was that the instructions "are not all contained in any one document" (R. I, 811). The instructions noted above which were disregarded were contained in two bulletins, both of which were in the hands of the Commission long prior to the filing of this complaint (supra, p. 44). It would seem that an expert qualified to make a scientific test of a device, and to arrive at an expert opinion concerning its performance, would be capable of looking at two pieces of paper for his directions. At all times the advice and assistance of petitioners' representatives were available (see supra, pp. 26 to 27).

The Commission's final ground of decision rested upon the testimony of certain of the experts who performed the experiments. They testified that their results would

have been the same whether or not they followed the instructions. This, of course, is surmise. In addition, we answer in the words of Dr. Hoffman on cross-examination (R. III, 1272-1273, 1275):

"Q. * * * Let us assume that a manufacturer comes out with some new product. Let us assume that he has developed an entirely new scientific theory on which his product is based. Let us assume that the scientific world has not yet learned of that theory and has not yet had an opportunity to study it and evaluate it. Let us assume that that product goes out in the market and is used, and let us assume, as the record in this case shows, that in practical installations, that product is 97 per cent successful. Let us assume that the product is then brought to the National Bureau of Standards for testing and evaluating, and let us assume that the manufacturer has certain explicit instructions as to how the product is to be installed and operated.

Now, when these tests are being conducted, let us assume whoever is conducting them is not familiar with the scientific theory that this inventor has developed. Do you not feel, Doctor, that under those circumstances, in all fairness to the inventor, as well as to yourself and the National Bureau of Standards, that the only reliable way to conduct a fair test would be to carry out to the letter the instructions of the manufacturer, irrespective of what your own opinions might be as to the value of the installation itself?

* * * * * * *

A. I think I will repeat what I said before. If the manufacturer has instructions, since he does not have the knowledge of the theory and I don't, then I be-

lieve I had better follow those instructions as nearly as possible as they are given."

D. THE COMMISSION ERRED IN RELYING UPON WHAT IT TERMED A SHOWING THAT 3,000 INSTALLATIONS OF THE EVIS WATER CONDITIONER WERE FAILURES.

In its opinion the Commission says (R. I, 809):

> "The evidence received in support of the complaint includes a showing that 3,000 installations of the Evis Water Conditioner were failures (by virtue of an admission of counsel) * * *."

This statement, standing alone, grossly misrepresents the record. The entire proceedings in this regard are at R. V, 3726-3768, and can be read in a few moments. What actually occurred is this (R. V, 3726-3768):

The Commission's case in chief consisted entirely of the testimony of the experts to whom we have referred. It was taken over the course of several months in Los Angeles, San Francisco, Pullman, Portland, Cleveland and Washington, D.C. Thereafter petitioners put on their case, at Los Angeles, Fresno, San Francisco, Seattle, Tacoma, and Dallas. When petitioners rested, counsel for the Commission proposed to start all over again by calling user witnesses who, he said, would testify that installations had failed. Counsel for petitioners moved to exclude this evidence, protesting that it was not rebuttal evidence; that if the Commission had intended to rely on user testimony, it should have introduced it in its case in chief; that it would be an abuse of discretion by the Hearing Examiner to open the hearings to further endless testimony. He

recalled that the testimony of 124 witnesses had been taken in 11 widely distant cities over the course of two years; that the cost to petitioners had been staggering, resulting in their virtual bankruptcy; that if accepted rules of trial were not enforced the case would become moot for lack of ability further to defend it (R. V, 3749-3750, 3754). Further he pointed out that petitioners never have represented that the Evis unit works in all cases; that petitioners' own testimony showed that there had been approximately 100,000 units installed of which about 97 per cent were successful and approximately three per cent were unsuccessful. In the circumstances counsel contended that the evidence which the Commission proposed to introduce was not only inadmissible as rebuttal evidence but also would add nothing to the record (R. V, 3751-3754).

Thereupon the Hearing Examiner inquired of counsel for the Commission whether he proposed to present the testimony of more than 3,000 witnesses, which counsel for petitioners would admit would be the approximate number of failures that could be shown from among the total installations (R. V, 3757 et seq.). The following then occurred (R. V, 3764-3765, 3767-3768):

> "MR. MICHAEL: I will say it as frankly and as bluntly as I can that I don't have any doubt in my mind—and as I said at the outset before—we don't claim it works in every case. We concede that 3 percent.
>
> HEARING EXAMINER LIPSCOMB: At least 3 percent.
>
> MR. MICHAEL: Have been unsuccessful and there have been a hundred thousand sold. If we

wanted to take all the testimony available in the country you could probably find 3,000 witnesses in the country who would say it did not work. The only reservation I make is that by the same token it is our position that if we went to every nook and cranny in the country we would get the other 97,000 and we would both be doing what the record already shows.

I can't say any more than that.

HEARING EXAMINER LIPSCOMB: One part of your statement is an admission, the other is a self-serving declaration and they would be so regarded.

MR. MICHAEL: I don't quarrel with that. I am only making the admission with that reservation. I am saying that that is what the record shows. * * *

* * * * *

MR. DOWNS: I have one remark to make with regard to the statement that Mr. Michael made. I do not want the record to indicate that I in any way endorse his statement that it is successful 97 percent of the time. I do not concede that point. He made the statement that it did not work in 3,000 cases but it did work in 97,000 cases. I do not want to have the record indicate that I agree with that at all, the 97,000.

HEARING EXAMINER LIPSCOMB: In light of the admission on the record that Mr. Michael made, it appears to the Hearing Examiner that his present problem becomes a simple one, that further testimony by the government as to unsatisfied users could not produce more unless I am shown in some peculiar particular that it would be. Therefore it should not be received. Accordingly the hearing examiner rules that the proposed testimony will not be proper rebuttal testimony in the light of what I have said and therefore will not be received."

D. THE COMMISSION ERRED IN HOLDING THAT PETITIONERS' REFUSAL TO MAKE A PUBLIC DISCLOSURE OF THEIR METHOD OF PROCESSING THE METAL IN THE EVIS UNIT SHOULD BE CONSTRUED AS STRONG CONFIRMATION OF THE CHARGES IN THE COMPLAINT.

The Commission held (R.I. 815):

> "Finally, we hold that under the circumstances of this case, the respondents were not privileged to stand upon their refusal to disclose the composition of the metal in the Evis Water Conditioner and the claimed special processing thereof as trade secrets; and their failure to introduce the evidence thus within their immediate knowledge and control, if existing anywhere, relative to such factors which might explain the claimed effects of the device on water, is strong confirmation of the charges in the complaint."

In so ruling the Commission relied upon *Charles of the Ritz Dist. Corp. v. Federal Trade Com'n* (2 Cir. 1944) 143 F.2d 676. That case involved a 'rejuvenating" face cream, said to contain vital organic ingredients which restored the bloom of youth. On appeal—although petitioner had refused to reveal the secret formula for its cream—it contended that the medical testimony was not substantial because the experts who testified that it could not have a rejuvenating effect did not know what the cream contained. In these circumstances the court held that petitioner was not privileged to stand upon its refusal and that its failure to produce the formula was confirmation of the Commission's charges.

In the case at bar petitioners of course do not contend that the testimony of any of the experts is unsubstantial because he does not know the process by which the unit

is made. The question here is not how the unit is processed, but what is its affect upon water. As to this, the only knowledge Mr. Wells has is what he has observed in the behavior of the water. He has withheld none of this knowledge. The same observations Mr. Wells has made can be made by the Commission's witnesses. Nor has Mr. Wells withheld any knowledge as to why the unit is effective. His results have been achieved by experimentation (as have virtually all results in the field of water treatment, supra, p. 47, et seq.). Explanation awaits further knowledge. The only fact Mr. Wells has withheld is the method of processing the metal. It would, we submit, be grossly unfair and unnecessary to require him to disclose this process to the public, which would immediately lose to him all of his common law rights. He already has disclosed the process to the Patent Office. There, as the law provides, the secrecy of his disclosure is maintained until a patent issues (Rules of Practice in Patent Cases, section 1.14, 35 U.S.C.A., Supp., 653).

It is manifest, we submit, that the disclosure of petitioners process is not essential to the development of truth in this case. The demonstrated effects of the unit, not how it is made, determine the issues. The testimony of the Commission's experts in this case is not unsubstantial because they do not know the process. It is unsubstantial because the tests were either wholly irrelevant or were conducted under such artificial conditions, as compared with actual operating conditions, as to have no probative value.[60]

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[60] *Kidder Oil Co. v. Federal Trade Commission* (7 Cir. 1941) 117 F.2d 892, 897, 898; *Navajo Freight Lines v. Mahaffy* (10 Cir.

Had the Commission wished to present reliable, probative and substantial evidence that the Evis unit would not work on marine evaporators, for example, it could—instead of having Dr. Hoffman drip water through a 2½-inch section of pipe—have arranged for one of its representatives to make parallel tests, under actual operating conditions, on shipboard. If it had wished, as another example, to prove that the unit would not function on evaporative condensers, it could—and this we emphasize—have called the employees of the United States Department of Agriculture at Beltsville, Maryland, to testify to the installation at the Experiment Station. This installation was but a few miles from the hearing room. The attention of the Commission had been called to it long before the Commission closed its case in chief (supra, pp. 27-30).

As authority for its ruling in the *Charles of the Ritz* case the court cited a number of well-known cases applying the principle that silence can be inferential evidence against one who has strong evidence in his possession and does not produce it. The principle of these cases is applicable, we submit, not to petitioners, but to the Commission.

1949) 174 F.2d 305, 309-310; *Hutzler Bros. Co. v. Sales Affiliates* (4 Cir. 1947) 164 F.2d 260, 265; *Donner v. Walgreen Co.* (N.D. Ill. 1930) 44 F.2d 637, 642; *International Const. Corp. v. Chapman Chemical Co.* (S.D. Fla. 1952) 103 F.Supp. 679, 682; *Johnstown Tribune Pub. Co. v. Briggs* (3 Cir. 1935) 76 F.2d 601; *Lent v. Thackaberry* (1934) 136 Cal. App. 783.

CONCLUSION.

We respectfully submit that the order of the Commission is erroneous and should be set aside.

Dated, San Francisco, California,
November 20, 1959.

Respectfully submitted,
FRANCIS R. KIRKHAM,
JAMES MICHAEL,
HARRY C. SCOTT,
PILLSBURY, MADISON & SUTRO,
Attorneys for Petitioners.

(Appendices A, B, C, D, E, F and G follow.)

Appendices.

Appendix A

APPENDIX A

List of Exhibits

(Pursuant to Rule 18.2(f))

Commission's Exhibit No.	Identified	Offered	Received as Evidence	Record Identification
2	II, 84	II, 85	II, 85	VI, 818, 819
3	II, 89	II, 90	II, 91	VI, 820
4	II, 138	II, 152	II, 152	VI, 823; 2-1/6168-1*
5	II, 145	II, 148, 403	II, 404	VI, 824, 825
7	II, 239	II, 239	II, 239	VI, 826
8	II, 319	II, 320	II, 321	VI, 827-838
9	II, 323	II, 324	II, 324	VI, 839, 840
10	II, 324	II, 324	II, 325	VI, 841; 2-2/6168-1*
11	II, 358	II, 359	II, 359	VI, 842, 843
12	II, 403	II, 407	II, 408	VI, 844
13	II, 403	II, 411	II, 411	VI, 845

*Record identifications marked with asterisks are to physical exhibits. The references to volume VI of the Transcript of Proceedings are to identification pages which set forth the numbers assigned to these exhibits by the Commission in certifying the record to this Court. The second numbers stated are the Commission's numbers so assigned, number 6168 being the Document number of the proceeding before the Commission.

Received as Record

ommission's xhibit No.	Identified	Offered	Received as Evidence	Record Identification
14	II, 403	II, 411	II, 411	VI, 846
15	"	"	"	VI, 847-848
16	"	"	"	VI, 849-850
17	"	"	"	VI, 851
18	"	"	"	VI, 852-855
19	"	"	"	VI, 856-858
20	"	"	"	VI, 859,860
21	"	"	"	VI, 861-864
22	"	"	"	VI, 865-871
23	"	"	"	VI, 872, 873
24	"	"	"	VI, 874
25	"	"	"	VI, 875
26	"	"	"	VI, 876, 877
27	"	"	"	VI, 878 - 885
28	"	"	"	VI, 886-889

ommission's xhibit No.	Identified	Offered	Received as Evidence	Record Identification
29	II, 403	II, 411	II, 411	VI, 890, 891
30	"	"	"	VI, 892-895
31	"	"	"	VI, 896-900
33	"	"	"	VI, 901-904
34	II, 473	II, 473	II, 473	VI, 905
35	II, 560	II, 560	II, 560	VI, 906
36	II, 588	II, 589	II, 590	VI, 908
37	II, 601	II, 602	II, 602	VI, 911
38	II, 605	II, 605	II, 606	VI, 914
39	II, 607	II, 608	II, 611	VI, 916
40	II, 608	II, 613	II, 614	VI, 919
41	II, 608	II, 615	II, 615	VI, 922
42	II, 617	II, 622	II, 622	VI, 925
43	II, 625	II, 626	II, 626	VI, 928
44	II, 641	II, 642	II, 642	VI, 924; 2-3/6168-1*

Commission's Exhibit No.	Identified	Offered	Received as Evidence	Record Identification
45	II, 705	II, 707	II, 707	VI, 930, 931
46	II, 705	II, 707	II, 707	VI, 932, 933
47	II, 884	II, 886	II, 886	VI, 934-937
48	II, 925	II, 936	II, 936	VI, 938
49	II, 925	II, 936	II, 936	VI, 941
50	III, 987	III, 993	III, 993	VI, 944
51	III, 991	III, 993	III, 993	VI, 945; 2-13/6168-1*
52	III, 991	III, 993	III, 993	VI, 946; 2-14/6168-1*
54	III, 1133	III, 1135	III, 1136	VI, 948, 949
55	III, 1133	III, 1135	III, 1136	VI, 951, 952
57	V, 3791	V, 3791	V, 3791	VI, 954, 955
58	V, 3792	V, 3792	V, 3792	VI, 956-959
61	V, 3816	V, 3816	V, 3816	VI, 962; 2-8/6168-1*
64	V, 3817	V, 3818, 3953	V, 3956	VI, 965-1008

Petitioners' Exhibit No.	Identified	Offered	Received as Evidence	Record Identification	
34	III, 1192	III, 1729	III, 1730	VI, 1009-1012	
48	IV, 2442	IV, 2445	IV, 2447	VI, 1013-1017	
49, A & B	IV, 2691	IV, 2693	IV, 2693	VI, 1018;	2-4/6168-1 *
50, A & B	IV, 2877	IV, 2879	IV, 2879	VI, 1019;	2-5/6168-1 *
51, A - D	IV, 2937-2939	IV, 2950	IV, 2951	VI, 1020;	2-15/6168-1 *
52	IV, 2978	IV, 2984	IV, 2984	VI, 1021-1024	
54, A - D	IV, 3322	IV, 3324	IV, 3324	VI, 1025;	2-16/6168-1 *
55	V, 3728	V, 3728	V, 3728	VI, 1026-1062	
56	V, 3728	V, 3728	V, 3728	VI, 1066-1096	
57	V, 3728	V, 3728	V, 3728	VI, 1100-1125	
58	V, 3728	V, 3728	V, 3728	VI, 1131-1158	
59	V, 3979	V, 3991	V, 3991	VI, 1162;	2-11/6168-1 *
60	V, 3979	V, 3991	V, 3991	VI, 1163;	2-12/6168-1 *

Appendix B

Appendix B

LIST OF WITNESSES PRODUCED BY THE PETITIONERS.

Los Angeles, California

1.	Edwin L. Stanton, Owner Stanton Oil Company, Santa Cruz Island Company, Long Beach and Santa Cruz Island.	R. III, 1732-1777
2.	Andrew J. Deleuw, Apartment house and home owner, Los Angeles.	R. III, 1777-1804
3.	Walter Knott, Owner, Knott's Berry Farm, Buena Park.	R. III, 1804-1839
4.	Ray N. Shaw, Manager, Buffums', Santa Ana Branch Store, Santa Ana.	R. III, 1839-1891
5.	Lawrence L. Sligh, Chief Engineer, Bridgford Packing Co., Anaheim.	R. III, 1892-1930
6.	R. L. Maple, Operating Refrigeration Engineer, Union Ice Company, Van Nuys, Oxnard, Claremont, Wilmington, Anaheim, Los Angeles, San Pedro, San Fernando.	R. III, 1931-1963
7.	Eugene I. Leupp, Assistant Manager, Associated Molding Co., East Los Angeles.	R. III, 1963-1973
8.	Joseph Suchodolski, Maintenance Engineer, Harris Company, San Bernardino.	R. III, 1976-2011
9.	David C. Griffen, Avocado Grower and Motion Picture Producer, San Marino and Fallbrook.	R. III, 2011-2032

31.	Antone Perata, Refrigeration Engineer, Oakland.	R. IV, 2368-2387
32.	Lief Westwick, Marine Chief Engineer, Pope & Talbot, Inc., San Francisco.	R. IV, 2388-2412
33.	John Price, Chief Engineer, California Sanatorium, Belmont.	R. IV, 2415-2431
34.	Joseph Moran, Marine Evis Distributor, San Francisco.	R. IV, 2431-2473 2481-2499
35.	Mario Bellante, Refrigeration Engineer, Alioto Fish Co., San Francisco.	R. IV, 2474-2481
36.	Howard Frantz, Research Chemist, Peninsula Laboratories, Mountain View.	R. IV, 2500-2534 2719-2747
37.	Glenn Orr, Chief Engineer, Bercut-Richards Packing Co., Sacramento.	R. IV, 2536-2551
38.	Bill A. Bouskos, Supermarket proprietor, Broadway Markets, Redwood City.	R. IV, 2551-2559
39.	Edward C. Buchanan, Refrigeration Engineer, Buchanan's Refrigerator Service, Redwood City.	R. IV, 2560-2586
40.	Robert T. Mathers, 1714 Hayes Street, Owner, Cleaning Shop, San Francisco.	R. IV, 2587-2597

49. Milton Scott, Administrator-Manager, Fairfield Hospital, Fairfield.	R. IV, 2772-2785
50. Edith Helen Collins, Stewardess, Yosemite Club, 311E Main Street, Stockton.	R. IV, 2825-2838
51. Ben Bava, Engineer, College of the Pacific, Stockton.	R. IV, 2838-2849
52. Gloria Frances Sirene, Chemist, Peninsula Laboratories, Mountain View.	R. IV, 2849-2873
53. Paul H. Ralston, home owner, San Mateo; Branch Manager, Cook's Oil Company.	R. IV, 2875-2891
54. Philip Anderson, Jr., Chief Engineer, S.S. "Young America," Waterman Steamship Corporation, Mobile, Alabama.	R. IV, 2892-2906
55. Arthur F. Tudury, Evis Distributor, Refrigerating & Power Specialties Co., San Francisco.	R. IV, 2906-2953 2977-2984
56. William J. O'Connell, Consulting Engineer, Burlingame.	R. IV, 2955-2977 2985-3050
Tacoma, Washington	
57. Frank X. Fischlin, Owner, Supreme Dairy, Tacoma.	R. IV, 3063-3071
58. Frank M. Fischlin, Supreme Dairy, Tacoma.	R. IV, 3071-3077
59. Ellis J. Shane, Engineer, American Rock Wool Corp., Tacoma.	R. IV, 3077-3089

81.	Ernest W. Tatum, Foreman, Jack Shook Tire Co., Dallas.	R. V, 3450-3459
82.	J. C. Pharr, Chief Engineer, Buckner Orphans Home, Dallas.	R. V, 3460-3493
83.	J. W. Little, Manager, Mayfair Hotel, Dallas.	R. V, 3493-3502
84.	Carl E. Doss, Co-owner and Manager, Shamrock Motel, Dallas.	R. V, 3502-3516
85.	Charles R. Monk, Rig Supervisor, Odessa, Texas. Helmerich & Payne, Inc., Tulsa, Oklahoma.	R. V, 3518-3529 3543-3558
86.	John H. Pendergrass, Manager, Dolch Concrete Pipe Co., Dallas.	R. V, 3530-3543
87.	Leonard C. Smith, Maintenance Foreman, Odessa, Texas, Guy Mabee Drilling Company, Midland, Texas.	R. V, 3559-3563 3583-3611
88.	Orville H. McCartney, District Superintendent, Kilgore, Texas, Three States Natural Gas Co., Dallas, Texas.	R. V, 3564-3581
89.	Herman M. Waldman, Partner, Dallas City Packing Co., Dallas.	R. V, 3612-3625
90.	Burton N. Fullen, Owner, Oaklawn Cleaners, Dallas.	R. V, 3625-3643

91.	M. L. Middleton, Manager, T. S. Schroeder Estate, Oil Operators, Dallas.	R. V, 3643-3673
92.	W. E. Weaver, Vice President, Nemaha Oil Co., homeowner, Dallas.	R. V, 3675-3685
93.	Thomas A. Young, Refrigeration Maintenance, Worth Food Markets, Fort Worth.	R. V, 3686-3704
94.	Roy T. Durst, Petroleum Consulting Engineer, Gruy and Durst, Fort Worth, Texas; formerly Production Superintendent, Rowan Oil Company.	R. V, 3705-3723

Depositions

95.	Samuel R. Morris, Inglewood, California, Custodian-Chief Engineer, S.S. "Ampac Washington" and S.S. "Memory," Transoceanic Marine Corporation.	R. IV, 2637-2663
96.	Alexander MacKenzie, Leonia, N. J., Chief Engineer, S.S. "Esparta," United Fruit Company.	R. IV, 3168-3178
97.	George J. Bowersock, Stockton, California, Chief Engineer, S.S. "Voyager," Pope & Talbot, Inc., San Francisco.	Respondents' Exhibit No. 58 R. VI, 1131-1161
98.	John B. MacKenzie, New Orleans, Louisiana, Chief Engineer, S.S. "Kyska," Waterman Corporation of California.	Respondents' Exhibit No. 55 R. VI, 1026-1065

99.	Denzel R. Carpenter, Gardena, California, Chief Engineer, S.S. "Santa Paula," Union Oil Company, Los Angeles.	Respondents' Exhibit No. 56 R. VI, 1066-1099
100.	Frank C. Terres, Walwick, New Jersey, Chief Engineer, S.S. "Comayaga," United Fruit Company.	Respondents' Exhibit No. 57 R. VI, 1100-1130

Appendix C

SCALE—PREVENTION AND REMOVAL*

No. in Index		Number of Evis units			Boilers		Air conditioning and refrigeration equipment		Engine radiators; coolant lines		Heaters, urns and marine evaporators; washers	Piping systems, valves, nozzles; misc.
		Total identified by witness	Identified re scale removal	Identified re scale prevention	Evis units	No. of boilers	Evis units	No. of equipment	Evis units	No. of equipment	No. of Evis units	No. of Evis units
	Los Angeles, California											
1	Edwin L. Stanton	16 (1759 1763)	9	9	1 (1760)	1	1 (1741)	1	3 (1758-1759)	3		5 (1739-1745)
2	Andrew J. Deleuw	3 (1783-1791)	3	3							3 (1785-1791)	3 (1789 1791)
3	Walter Knott	2 (1810)	1	1			1 (1817-1822)	2			1 (1820-1829)	
4	Ray N. Shaw	1 (1846)	1	1	1 (1855-1857)	1	1 (1851-1852)	3			1 (1860-1869)	1 (1858 1879)
5	Lawrence L. Sligh	1 (1895)	1	1	1 (1897, 1898)	2						
6	R. L. Maple	8 (1933 1945 1947 1948)		8			8 (1937, 1946, 1948, 1950, 1951)	8				
7	Eugene I. Leupp	1 (1964)	1	1	1 (1967, 1968)	1						1 (1970)
8	Joseph Suchodolski	1 (1982)	1	1	1 (1986)	1	1 (1984, 1985)	3			1 (1982 1986 1991)	1 (1984 1990 1991)

*Transcript references in this Appendix are to testimony in volumes III, IV and V of the Transcript of the Record. Volume III includes pages 978 through 2,266; Volume IV includes pages 2,267 through 3,407; Volume V includes pages 3,408 through 3,994. Four depositions included in the Appendix are set forth in Volume VI, having been admitted as petitioners' exhibits. They are: John B. MacKenzie, Waterman Corporation of America, RX 55, R. VI, 1026-1065; Denzel R. Carpenter, Union Oil Company, RX 56, R. VI, 1066-1092;

No. in Index		Number of Evis units			Boilers		Air conditioning and refrigeration equipment		Engine radiators; coolant lines		Heaters, urns and marine evaporators; washers	systems, valves, nozzles; misc.
		Total identified by witness	Identified re scale removal	Identified re scale prevention	Evis units	No. of boilers	Evis units	No. of equipment	Evis units	No. of equipment	No. of Evis units	No. of Evis units
9	David C. Griffen	1 (2018)	1	1								1 (2026)
10	Kenneth L. Camp	4 (2035 2045)	3	3					3 (2036, 2043,	3 2038, 2045)		
11	Paul Bowen	1 (2062)	1	1								1 (2065-2067)
12	Clay Ellis	1 (2074)	1	1								1 (2076)
13	Clarence L. Jarvis	1 (2092)	1	1			1 (2099,	1 2106)			1 (2098 2100 2106)	1 (2097)
14	Joseph A. Thunder	4 (2121 2123 2139)	3	3								3 (2121-2122)
15	Philip A. Rogers	1 (2130)	1	1							1 (2133)	1 (2132-2137)
16	Theodore R. Berg	1 (2151)	1	1							1 (2151)	
Fresno, California												
17	Arthur A. Gallardo	4 (2162)	4	4	4 (2166-2169)	4						
18	Philip Wagner	1 (2193)		1			1 (2196)	1				1 (2196 2206)
19	Charles L. Boon	.....		(1)			(2209)					

No. in Index		Number of Evis units: Total identified by witness	Identified re scale removal	Identified re scale prevention	Boilers: Evis units	Boilers: No. of boilers	Air conditioning and refrigeration equipment: Evis units	Air conditioning and refrigeration equipment: No. of equipment	Engine radiators; coolant lines: Evis units	Engine radiators; coolant lines: No. of equipment	Heaters, urns and marine evaporators; washers: No. of Evis units	Piping systems, valves, nozzles; misc.: No. of Evis units
20	Richard Minor	1 (2212)	1	1	1	1 (2213)	1	1 (2214)				
21	Joe E. Lewis	1 (2220)	1	1							1 (2225)	1 (2222 2225)
22	Dr. Sydney F. Shute	1 (2236)	1	1								1 (2236 2242)
23	George P. Butcher	1 (2246)	1	1								1 (2246 2248)
24	Mrs. Sherwin Shields	1 (2254)	1	1			1	1 (2257)				1 (2257)
25	Fernon C. Wickstrom	6 (2270 2277 2279)	2	6			6	6 (2276, 2278, 2279, 2281, 2282, 2283)				
26	Arthur M. Lucas	1 (2294)	1	1			1	2 (2311 2315)				1 (2312)
27	Mario John Barsetti		(1)	(1)				(2300, 2304)				
28	Raymond A. Crosby	4 (2326 2328)	4	4			4	6 (2332, 2333, 2336)				
San Francisco, California												
29	Al Licalsi	1 (2348)	1	1	1	1 (2349-2350)						
31	Antone Perata	1 (2374)	1	1			1	2 (2378, 2379)				

No. in Index		Number of Evis units			Boilers		Air conditioning and refrigeration equipment		Engine radiators; coolant lines		Heaters, urns and marine evaporators; washers	systems, valves, nozzles; misc.
		Total identified by witness	Identified re scale removal	Identified re scale prevention	Evis units	No. of boilers	Evis units	No. of equipment	Evis units	No. of equipment	No. of Evis units	No. of Evis units
32	Lief Westwick	1 (2390)	1	1							1 (2394-2398)	
33	John Price	3 (2416 2417)		3	3 (2420-2422)	3						
35	Mario Bellante	1 (2476)		1			1 (2476)	1				
37	Glen Orr	2 (2539 2544)		1			1 (2541-2543)	8				
38	Bill A. Bouskos	2 (2552)	1	2			2 (2556-2558)	24				
39	Edward C. Buchanan	2 (2564 2573)		2			2 (2573-2575)	2				2 (2569 2577)
40	Robert T. Mathers	1 (2588)		1	1 (2591-2593)	1						
41	John E. Burman	1 (2602)		1	1 (2602, 2603)	2						
42	Frank V. Patmon	1 (2623)	1	1							1 (2626-2628)	1 (2625)
43	Lewis A. Deppman	16 (2674)		16							16 (2675)	
44	Carl R. Shepard	8 (4 in No. 28) (2682-2685)		(4)			(2682-2683)					1 (2684)

No. in Index		Number of Evis units			Boilers		Air conditioning and refrigeration equipment		Engine radiators; coolant lines		Heaters, urns and marine evaporators; washers	Piping systems, valves, nozzles; misc.
		Total identified by witness	Identified re scale removal	Identified re scale prevention	Evis units	No. of boilers	Evis units	No. of equipment	Evis units	No. of equipment	No. of Evis units	No. of Evis units
45	Jack F. Manney, Jr.	1 (2690)	1	1								1 (2691-2693)
47	John Blake, Jr.	2 (2751 2755)		2							2 (2753-2757)	
48	Frank Danerro	1 (2765)	1	1	1 (2767-2768)	1					1 (2768-2769)	
49	Milton Scott	1 (2773)	1	1							1 (2777-2781)	
50	Edith H. Collins	1 (2826)	1	1								1 (2829)
51	Ben Bava	2 (2840 2843)	1	2	1 (2841-2842)	1					1 (2843 2845)	
53	Paul H. Ralston	1 (2876)	1	1								1 (2880-2881)
54	Philip Anderson, Jr.	1 (2895)		1							1 (2899-2900)	
Tacoma, Washington												
57	Frank X. Fischlin	1 (3065)	1	1	1 (3068)	1						1 (3069)
58	Frank M. Fischlin	.....	(1)	(1)	(3073-3076)						1 (3074)	
59	Ellis J. Shane	1 (3080)	1	1	1 (3082-3084)	1						

No. in Index		Number of Evis units: Total identified by witness	Identified re scale removal	Identified re scale prevention	Boilers: Evis units	Boilers: No. of boilers	Air conditioning and refrigeration equipment: Evis units	Air conditioning and refrigeration equipment: No. of equipment	Engine radiators; coolant lines: Evis units	Engine radiators; coolant lines: No. of equipment	Heaters, urns and marine evaporators; washers: No. of Evis units	Piping systems, valves, nozzles; misc.: No. of Evis units
60	Howard LaVictoire	.....	(1)	(1)	(3097)							
61	Sivert Wiborg	1 (3103)	1	1	1 (3105-3111)	2						
62	Axel Berg	1 (3121)	1	1	1 (3121-3125)	2						
63	Matthew W. Ryan	1 (3134)	1	1	1 (3136-3138)	1						
66	Milford J. Anderson	1 (3180)	1	1	1 (3182-3185)	1						
67	Carl G. Rosengren	1 (3192)	1	1	1 (3194)	1						1 (3195)
68	Earl C. Maitland	1 (3204)		1	1 (3208)	1						
69	Harry Guske	1 (3221)	1	1	1 (3222-3224)	3						
71	R. E. Burke	1 (3239)	1	1	1 (3240-3247)	2						
73	Clifton B. Morris	1 (3330)		1	1 (3332-3334)	1						
74	Erle C. Young	2 (3341)	1	1	1 (3345-3348)	2						
Seattle, Washington												
75	Shig Takeuchi	1 (3355)		1			1 (3357-3359)	1				
76	Raymond Peel	1 (3368)		1	1 (3375-3376, 3387)	3					1 (3387)	

No. in Index		Number of Evis units			Boilers		Air conditioning and refrigeration equipment		Engine radiators; coolant lines		Heaters, urns and marine evaporators; washers	Piping systems, valves, nozzles; misc.
		Total identified by witness	Identified re scale removal	Identified re scale prevention	Evis units	No. of boilers	Evis units	No. of equipment	Evis units	No. of equipment	No. of Evis units	No. of Evis units
77	Francis H. Howard	9 (3392)	9	9							9 (3393-3395)	
78	W. W. Smithers	2 (3399 3401)		2							2 (3401-3402)	
Dallas, Texas												
79	Roy Guffy	23 (3412-3413)	23	23					23	23 (3417-3429)		
80	J. M. Gardner	5 (3439 3441)	5	5	5	19 (3441-3444)						
81	Ernest W. Tatum	1 (3454)	1	1	1	1 (3455-3456)						
82	J. C. Pharr	8 (3480-3481)	6	6	3	10 (3468, 3473-3474)	2	6 (3469)			3 (3477 3480)	3 (3477 3492)
83	J. W. Little	1 (3494)		1			1	1 (3498-3500)				
84	Carl E. Doss	1 (3507)		1			1	1 (3510)				1 (3508-3510)
85	Charles R. Monk	8 (3545 3549 3550)	8	8					8	18 (3548-3558)		
86	John H. Pendergrass	3 (3532)		3							3 (3535-3542)	

No. in Index		Number of Evis units			Boilers		Air conditioning and refrigeration equipment		Engine radiators; coolant lines		Heaters, urns and marine evaporators; washers	systems, valves, nozzles; misc.
		Total identified by witness	Identified re scale removal	Identified re scale prevention	Evis units	No. of boilers	Evis units	No. of equipment	Evis units	No. of equipment	No. of Evis units	No. of Evis units
87	Leonard C. Smith	18 (3594-3596)	18	18					18 (3595-3607)	18		
88	Orville H. McCartney	3 (3567-3570)	2	3							1 (3572-3574)	2 (3567-3568)
90	Burton N. Fullen	1 (3626)		1	1 (3633,	1 3641)					1 (3636)	
91	M. L. Middleton	4 (3645 3657)	4	4	2 (3648-3651,	2 3662-3665)					3 (3652 3662-3664)	3 (3654-3655, 3668)
92	W. E. Weaver	2 (3679)	2	2			2 (3681,	1 3682)			2 (3682)	2 (3682 3683)
93	Thomas A. Young	17 (3687)	17	17			17 (3694-3698,	17 3703)				
94	Roy T. Durst	1 (3714)	1	1							1 (3710-3716, 3723)	1 (3714)
Depositions												
95	Samuel R. Morris	1 (2639 2658)	1	1							1 (2646-2649)	
96	Alexander MacKenzie	1 (3169)	1	1							1 (3171-3173)	

No. in Index		Number of Evis units			Boilers		Air conditioning and refrigeration equipment		Engine radiators; coolant lines		Heaters, urns and marine evaporators; washers	Piping systems, valves, nozzles; misc.
		Total identified by witness	Identified re scale removal	Identified re scale prevention	Evis units	No. of boilers	Evis units	No. of equipment	Evis units	No. of equipment	No. of Evis units	No. of Evis units
97	George J. Bowersock	1 (RX 58, p. 1)		1							1 (RX 58, pp. 11-12)	
98	John B. MacKenzie	2 (RX 55, p. 3)	2	2							2 (RX 55, pp. 10-11, 20-21)	
99	Denzel R. Carpenter	1 (RX 56, p. 3)	1	1							1 (RX 56, p. 12)	
100	Frank C. Terres	1 (RX 57, p. 3)	1	1							1 (RX 57, pp. 10-11)	
		247	168	225	43	74	57	99	55	65	68	46
(88 witnesses)			(63 witnesses)	(88 witnesses)	(34 witnesses)		(26 witnesses)		(5 witnesses)		(33 witnesses)	(31 witnesses)

RECAPITULATION OF APPENDIX C

SCALE—PREVENTION AND REMOVAL

No. of witnesses	Place of hearing	Number of Evis units			Boilers		Air conditioning and refrigeration equipment		Engine radiators; coolant lines		Heaters, urns and marine evaporators; washers	Piping systems, valves, nozzles; misc.
		Total identified by witnesses	Identified re scale removal	Identified re scale prevention	Evis units	No. of boilers	Evis units	No. of equipment	Evis units	No. of equipment	No. of Evis units	No. of Evis units
16	Los Angeles, California, May 23-26, 1955	47	29	37	5	6	13	18	6	6	9	19
12	Fresno, California, May 31-June 1, 1955	21	16	21	5	5	13	17			1	6
21	San Francisco, California, June 2-9, 1955	50	11	41	8	9	7	37			24	7
14	Tacoma, Washington June 13-15, 1955	13	10	12	12	18					1	2
4	Seattle, Washington June 16, 1955	13	9	13	1	3	1	1			12	
15	Dallas, Texas October 12-14, 1955	96	87	94	12	33	23	26	49	59	14	12
6	Depositions (Marine Engineers)	7	6	7							7	
		247	168	225	43	74	57	99	55	65	68	46
(88 witnesses)			(63 witnesses)	(88 witnesses)	(34 witnesses)		(26 witnesses)		(5 witnesses)		(33 witnesses)	(31 witnesses)

Appendix D

Appendix D

IMPROVEMENT OF AGRICULTURAL GROWTH, LEACHING OF ALKALI, PREVENTION AND REMOVAL OF DEPOSITS ON LEAVES OF PLANTS, AND INHIBITION OF ALGAE GROWTH.

No. in Index	Witness	No. of Evis units	Record
1	Edwin L. Stanton	7	III, 1739-1740, 1759-1763
3	Walter Knott	2	III, 1810, 1823-1824
9	David C. Griffen	1	III, 2018, 2018-2023
12	Clay Ellis	1	III, 2074
14	Joseph A. Thunder	3	III, 2121-2127, 2139
21	Joe E. Lewis	1	III, 2220-2223
22	Dr. Sydney F. Shute	1	III, 2236-2242
23	George P. Butcher	1	III, 2246-2248
24	Mrs. Sherwin Shields	1	III, 2254-2256
31	Antone Perata	1	IV, 2374-2378
35	Mario Bellante	1	IV, 2476-2477
36	Howard Frantz	1	IV, 2518-2522
52	Gloria F. Sirene	–	IV, 2855-2857
72	Thomas W. Simington	1	IV, 3314-3321
	Total No. of Evis units:	22	

Total No.
of witnesses: 14

Appendix E

Appendix E

IMPROVEMENT IN ODOR OR TASTE OF WATER OR MAKING OF BETTER TASTING COFFEE.

No. in Index	Witness	No. of Evis units	Record
2	Andrew J. Deleuw	1	III, 179
10	Kenneth L. Camp	1	III, 204
24	Mrs. Sherwin Shields	1	III, 225
42	Frank V. Patmon	1	IV, 262
50	Edith H. Collins	1	IV, 283
53	Paul H. Ralston	1	IV, 2881-288
91	M. L. Middleton	2	V, 365
	Total No. of Evis Units:	8	

Total No. of witnesses: 7

Appendix F

Appendix F

EFFECTIVE USE IN REMOVAL OF GREASE FROM DRAINS, PREVENTING VARIOUS TYPES OF STAINS AND SCUMS AND IN RETARDING THE PITTING OF METAL.

No. in Index	Witness	No. of Evis units	Record
2	Andrew J. Deleuw	1	III, 1783, 1789
4	Ray N. Shaw	1	III, 1846, 1872
6	R. L. Maple	1	III, 1941
8	Joseph Suchodolski	1	III, 1982, 1994
10	Kenneth L. Camp	1	III, 2049-2050
41	John E. Burman	1	IV, 2602, 2612
44	Carl R. Shepard	1	IV, 2682-2685
46	Christopher S. Wood	4	IV, 2707-2712
50	Edith H. Collins	1	IV, 2826-2829
70	Walter Hasbrook, Jr.	1	IV, 3286, 3277
76	Raymond L. Peel	1	IV, 3386-3387
82	J. C. Pharr	2	V, 3471, 3481
84	Carl E. Doss	1	V, 3507, 3508
88	Orville H. McCartney	2	V, 3567-3568
89	Herman M. Waldman	1	V. 3614, 3619-3620
91	M. L. Middleton	2	V, 3654-3655
92	W. E. Weaver	2	V, 3679-3682
	Total No. of Evis units:	24	

Total No. of witnesses: 17

Appendix G

Appendix G

LAUNDRY USES AND EFFICIENCY OF SOAP.

No. Appendix B	Witness	No. of Evis units	Record
2	Andrew J. Deleuw	2	III, 1783-1791
3	Walter Knott	1	III, 1810, 1822
4	Ray N. Shaw	1	III, 1846, 1875
9	David C. Griffen	1	III, 2018, 2024-2026
12	Clay Ellis	1	III, 2074, 2075
14	Joseph A. Thunder	1	III, 2121-2123, 2139
15	Philip A. Rogers	1	III, 2130, 2134
24	Mrs. Sherwin Shields	1	III, 2254, 2256
36	Howard Frantz	1	III, 2056; IV, 2510-2514
37	Glenn Orr	1	IV, 2544-2546
41	John E. Burman	1	IV, 2602, 2605-2615
46	Christopher S. Wood	4	IV, 2707-2710, 2712-2713
50	Edith H. Collins	1	IV, 2826, 2831-2832
53	Paul H. Ralston	1	IV, 2876, 2882
70	Walter Hasbrook	–	IV, 3256
74	Erle C. Young	1	IV, 3341, 3346
76	Raymond L. Peel	1	IV, 3377-3380, 3382
90	Burton N. Fullen	1	V, 3626, 3634
	Total No. of Evis units:	21	

Total No.
of witnesses: 18

No. 16481

IN THE
United States Court of Appeals
For the Ninth Circuit

EVIS MANUFACTURING COMPANY, a corporation, and ARTHUR N. WELLS, *Petitioners*

v.

FEDERAL TRADE COMMISSION, *Respondent*

On Petition to Review an Order of the Federal Trade Commission

---

BRIEF FOR RESPONDENT

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IN THE

United States Court of Appeals For the Ninth Circuit

No. 16481

EVIS MANUFACTURING COMPANY, a corporation, and ARTHUR N. WELLS, *Petitioners*

v.

FEDERAL TRADE COMMISSION, *Respondent*

On Petition to Review an Order of the Federal Trade Commission

---

BRIEF FOR RESPONDENT

I. COUNTERSTATEMENT OF THE CASE

This case comes before the Court upon a petition to review and set aside an order to cease and desist issued by the Federal Trade Commission at the conclusion of proceedings on a complaint which charged petitioners

with violations of Section 5(a)(1) of the Federal Trade Commission Act.[1]

A. Proceedings before the Commission

By complaint issued on February 5, 1954, the Commission charged petitioners with unfair methods of competition and unfair and deceptive acts and practices in commerce in connection with the sale and distribution of a product represented as "Evis Water Conditioner" (hereinafter sometimes called "Evis"). It was alleged that petitioners sold in interstate commerce Evis conditioners, which they shipped from their place of business in California, and that the individuals Joseph T. Voorheis and Arthur N. Wells formulated, directed and controlled the policies and practices of the corporate petitioner (I, 2-3).[2] The unfair methods

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[1] Section 5(a)(1), 66 Stat. 632 (1952), 15 U.S.C. § 45(a)(1) (1958) provides:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are hereby declared unlawful.

And the authority of the Commission to enter its final order is given in Section 5(a)(6) of the Act, 66 Stat. 632 (1952), 15 U.S.C. § 45(a)(6) (1958):

> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

[2] Joseph T. Voorheis, president of the corporate petitioner at the time of the issuance of the complaint, passed away while the proceeding was pending before the Commission, which therefore dismissed the complaint as to him. Thus Arthur N. Wells, vice-president of the corporate petitioner (II, 404), is the sole individual petitioner.

As transmitted to the Court, the record which is not printed consists of seven parts. Roman numerals followed by Arabic numerals identify the Part or Volume and page number, respectively, of the record reference under discussion.

and unfair and deceptive acts were alleged to consist of false advertising, which, in substance, directly and by implication, represented that the Evis (I, 3-6)

(a) was made of a specially processed cast metal;

(b) had a catalytic effect on water passing through the conditioner which changes the physical behavior of such water in many beneficial ways;

(c) would solve hard water problems;

(d) would make hard water soft;

(e) would cause hard water to feel or act softer, giving it a silky-smooth quality for hair, bath, dishes, laundry and car wash without the use of chemicals;

(f) would remove or reduce unpleasant odors and flavors in water;

(g) would make water taste better;

(h) would improve the taste of coffee or foods;

(i) would reduce the amount of soap required for washing;

(j) would reduce the cost of heating water;

(k) would eliminate or reduce the harshness of water to the hands;

(l) would cause dishes or glassware to dry without leaving water stains;

(m) would remove grease;

(n) would prevent or remove scale;

(o) would prevent, reduce or eliminate scum;

(p) would prevent, reduce, or eliminate rust stains;

(q) would prevent, reduce or eliminate corrosion or retard pitting of metal;

(r) would improve the action of chemicals used for water softening purposes;

(s) would leach out alkalies and salts in soil;

(t) would improve the growth and production of agricultural or orchard products and plants;

(u) would improve the texture or structure of soil;

(v) would reduce the amount of water required for agricultural irrigation.

In their answer, petitioners generally denied that any statement or representation contained in their advertising was false, misleading or deceptive. They specifically asserted that some of the representations identified in the complaint had been discontinued, that their advertisements consistently stated that Evis was not a water softener, that their claims with regard to water qualities for agricultural purposes did not relate to the use of water for plant growth (I, 23-27).

Thereafter, hearings were held before an Examiner, who filed his initial decision dismissing the complaint on the grounds that the allegations were not supported by reliable, probative and substantial evidence (I, 512-547). On appeal, the Commission vacated the initial decision and remanded the case to the Examiner for the purpose of receiving evidence of further scientific tests of the Evis water conditioner (I, 654-655). Pur-

suant to the Commission's direction, additional scientific evidence was presented to the Examiner who then filed his second initial decision, again dismissing the complaint (I, 692-732).

Upon appeal, the Commission reversed the Examiner's second initial decision regarding the representation of Evis' beneficial effects on water and held these representations to be false and deceptive (I, 797-817). The Commission sustained the Examiner's ruling that there was no probative and substantial evidence of petitioners' having falsely claimed that Evis was made of a specially processed metal (I, 802, 814, 816). Accordingly, a final order was entered requiring petitioners to cease and desist from representing either that Evis has the qualities specified in subparagraphs (b) through (v) above or that Evis has any beneficial effect on water (I, 804-805).

B. The facts

The Evis, which purports to be a water conditioner, is just a piece of pipe having the appearance of an oversized coupling with a vertical crosspost cast inside, (II, 417-418; CX 10).[3] It is intended to be fitted into water systems and is made of cast iron or bronze, those of cast iron being coated both inside and outside by zinc galvanizing (CX 25-VI, 875; CX 29A-VI, 890;

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[3] References to Commission exhibits are preceded by the letters "CX" and those to petitioners' exhibits by "RX", followed by Roman and Arabic numerals which indicate the Part or Volume and page number, respectively, where the exhibit under discussion is found in the record.

CX 10 is a physical exhibit of an Evis water conditioner. For pictorial reproductions of an Evis pipe, see CX 2-VI, 818; CX 15-VI, 848; CX 17-VI, 851; CX 26-VI, 876-877; CX 28-VI, 887; CX 36-VI, 909; CX 37-VI, 910; CX 38-VI, 915.

CX 57-VI, 954-955; II, 420-421, 422, 423). The device is offered in various sizes and is priced according to size (CX 25-VI, 875; CX 26-VI, 877).

Petitioner Wells, who testified that he had invented the piece of pipe called "Evis", is neither a chemist nor a licensed engineer, but he has done work in the engineering field for some 20 years (II, 412). According to him, the Evis pipe does not cause any *chemical* change in the structure of water; it allegedly alters "*something physical*" in water (II, 415, 435; emphasis added). On the other hand, he concedes that the Evis pipe leaves unaffected such measurable physical characteristics of water as specific gravity, boiling point, viscosity, surface tension and density (II, 435, 436). He admits that the pipe is neither magnetized nor radioactive and that it does not contain any electrodes (II, 468). He asserts that the effect of the Evis is to change the behavior of the water at the interfaces (the area of contact between the fluid and any other substance) as soon as the water passes through this piece of pipe (II, 414-415); and the asserted effect, he contends, is the result of the "crystalline structure" of the Evis pipe rather "than [of] its chemistry," although the elements contained in the pipe admittedly are the same as those found in ordinary cast iron or in ordinary bronze (II, 422, 423). But, according to Wells, special processing somehow mysteriously adds elements to the metal which may or may not be detected by spectroanalysis (II, 424-425, 428). On advice of counsel he refused to disclose either the process or the identity of the elements added (II, 426). Yet he also testified that he is "not treating water by virtue of anything that is added to the

iron." (II, 428.) Thus, on the one hand, we are faced with statements that the alleged effect is to be attributed, as a result of the addition of elements by a special process, to the crystalline structure of the Evis pipe; and, on the other hand, we are confronted by the assertion that this purported effect is in no wise related to the addition of these elements.

Even though Wells has testified that he invented the device, he cannot explain why or how it performs the alleged functions; all he can say is that it is a phenomenon (CX 24-VI, 874; II, 444, 468). He cannot offer any scientific law or principle nor any scientific theory which would warrant scientists' lending credence to his claims (II, 416, 435-436, 461, 465; III, 1277). Though asserting that the usual laboratory tests will not reveal any effect of the Evis pipe upon water, he testified that the alleged difference in the water can be detected "along the lines of the phenomenon", whatever that means (II, 468). One of the tests recommended in petitioners' literature is to try the "feel" of two specimens of dirt or soil, one mixed with Evis-treated water (i.e., water that has passed through the Evis pipe), the other mixed with untreated water. The specimen made with Evis-treated water is supposed to feel "smooth, slippery and disintegrated" compared with the other specimen (CX 8A-VI, 828; CX 27A-VI, 879).

Since January 1, 1952, the Evis pipes have been sold in the various states and have been distributed with advertising material and installation instructions (II, 32, 85, 405, 407-412).[4] The following are some of the

[4] The following are samples of advertising material and installation instructions: CX 2-VI, 818-819; CX 8A through F-VI,

claims made by petitioners for the Evis pipe in their advertisements:

> The Special Processed Cast Metal of the Evis Conditioner imparts a continuous catalytic effect on water, water solids and entrained gases. This catalytic correction changes the physical behavior of water in many beneficial ways. (CX 12-VI, 844.)
>
> The amazing new Evis Water Conditioner . . . that makes hard water feel, taste, and act softer—without chemicals—without destroying natural minerals . . . that removes unpleasant odors and flavors . . . removes old scale and prevents new scale . . . saves fuel . . . that gives silky-smooth quality to water for hair, bath, dishes, laundry, car wash . . . that improves coffee and other food flavors. (CX 13-VI, 845.)
>
> Makes Even the Hardest Water Behave "Tame"! (CX 15-VI, 847.)
>
> We suggest you start two tomato plants (or start from tomato seeds, and record the dates when plants first appear). Treat one with EVIS-ized water and the other with raw water, of course—observe the difference in plant's growth, strength and relative abundance of fruit. (CX 21-VI, 862.)

Early installation instructions did not contain specific directions for placing the Evis in a water piping system (CX 2-VI, 818-819; CX 29A through B-VI, 890-891). According to the record, commencing

827-838; CX 12-VI, 844; CX 13-VI, 845; CX 14-VI, 846; CX 15-VI, 847-848; CX 17-VI, 851; CX 18-VI, 852-855; CX 19-VI, 856-858; CX 21-VI, 861-864; CX 22A through D-VI, 865-871; CX 23-VI, 872-773; CX 24-VI, 874; CX 26-VI, 876-877; CX 27A through D-VI, 878-885; CX 28-VI, 886-889; CX 29A through B-VI, 890-891; CX 30-VI, 892-895; CX 31A through E-VI, 896-900; CX 33-VI, 901-904; CX 57-VI, 954-955; CX 58-VI, 956-959; RX 34-VI, 1009-1012. RX 52-VI, 1021-1024 and CX 58 are identical.

in 1952, extening throughout 1953 and covering part of 1954, elaborate installation instructions were issued, each set superseding the previous one. These included such directions as an admonition not to mix Evis-treated water with untreated water and to provide proper grounding of the piping system (CX 8C-VI, 831-832; CX 21-VI, 864; CX 22D-VI, 871; CX 27B-VI, 881; CX 31C-VI, 898; CX 58-VI, 956-959; RX 34-VI, 1009-1012).[5]

However, as late as September 1953, the president of the corporate petitioner stated: "The plumber who installs the Evis units will usually place it so the water flows in the direction of the arrow although if he should make a mistake it would make no difference." (CX 34-VI, 905.) Above all, the latest instruction set (CX 57-VI, 954-955) which was issued in 1956 and which is included in the record omits many of the previous directions, such as those covering the requirement of proper grounding of the water piping system.

II. QUESTION PRESENTED

Are the Commission's findings of facts and conclusions of law based on substantial evidence?

III. SUMMARY OF ARGUMENT

The fundamental issue in the instant case is the substantiality of scientific proof upon which the Commission relied in concluding that the Evis pipe does not have any beneficial effect upon water, and in ruling that any contrary representations by petitioners are false, misleading and deceptive. This decision was based upon an amazing uniformity of view among

[5] CX 58 and RX 52 are identical.

the scientists who testified on behalf of the Commission and who had many years of experience in chemistry, physics and engineering, including the more specialized field of water treatment. Their unanimous opinion was that the Evis pipe could not affect water.

Further, their testimony was corroborated by that of the only scientist, a chemist, who was called as a witness on behalf of petitioners and who stated on the stand that tests to substantiate the validity of the Evis claims had proved to be inconclusive. Another chemist had been retained by petitioners as a consultant in this case; he also testified on their behalf, but counsel for petitioners did not ask him a single question about the operation of the Evis pipe or its effect upon water.

In the instant situation, therefore, the scientific testimony presented to the Commission stands uncontradicted by any other scientific testimony regarding the effectiveness of the Evis pipe. Thus, this is *not* a case in which the Commission was confronted with a conflict of views of scientists and the problem of resolving such conflict. *Vacu-Matic Carburetor Co.* v. *Federal Trade Commission,* 157 F. 2d 711, 713 (7th Cir. 1946), *cert. denied,* 331 U.S. 806 (1947); *Justin Haynes & Company* v. *Federal Trade Commission,* 105 F. 2d 988, 989 (2d Cir. 1939), *cert. denied,* 308 U.S. 616 (1939).

Petitioners' entire rebuttal evidence consisted of what is generally known as consumer or user testimony, given by 91 witnesses. On the other hand, the record also demonstrates that 3,000 other users, had they been called to the stand, would have testified that Evis was a failure, so that the statements of petitioners' witnesses would have been more than offset.

Therefore, in the light of these facts, reflected in the record and consonant with the controlling principles of law, the Commission was eminently justified in resting its decision upon the scientific evidence and in holding that the Evis pipe has none of the effects claimed by petitioners. *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.,* 316 U.S. 105, 106 (1942).

IV. ARGUMENT

A. The testimony and other evidence, covering tests, experiments and studies of the device, constitutes substantial proof that the Evis pipe has no effect on water.

The entire controversy centers upon the substantiality of the evidence which supports the Commission's decision. This evidence consists of opinion testimony by Commission witnesses based upon their education, training, knowledge, scientific background and experience and of testimony reciting results of laboratory tests and experiments performed with the Evis device and presenting the conclusions drawn from these results. We shall discuss first the opinion testimony.

1. The uncontradicted consensus of scientists that the Evis pipe does not affect water is substantial evidence.

Commission witness de Bussieres, a chemist and chemical engineer with 30 years of experience, particularly in chemical analysis of a large number of organic and inorganic products and materials (II, 476-477), unequivocally stated that according to his knowledge of theoretical chemistry, there is not "* * * anything about the device that would cause a change in the characteristic of water passing through it." (II, 482.)

Another opinion was that of Dr. James I. Hoffman, Chief of the Surface Chemistry Section and Assistant Chief of the entire Chemistry Division of the National Bureau of Standards, an agency of the United States Government. He has been associated with the Bureau since 1919 and has an outstanding record in his field, being the author of many scientific publications as well as the receiver of an award from the American Chemical Society (III, 1107-1114, 1142-1144). Not only is Dr. Hoffman an eminent chemist; he also has wide experience in the field of water treatment (III, 1115-1116). It was his opinion that the Evis pipe could not treat water to give it any beneficial effect and that the "crystalline structure" of this piece of pipe (p. 6 above) has nothing "* * * to do with the passage of water through the conditioner." (III, 1116-1117.) Nor could Dr. Hoffman visualize any "* * * scientific basis upon which [petitioners'] claims are based * * *." (III, 1168.)

In connection with further consideration of Dr. Hoffman's views, it should be noted that petitioner Wells described, during his testimony, the Evis pipe as a "catalyst"; but he also stated, at the same time, that it was *not* a "true catalyst." (II, 428-432.) In the advertisements, the pipe was characterized as having a "catalytic effect" or as producing a "catalytic action," which changes the "*physical* behavior" of water (CX 8A-VI, 827; CX 12-VI, 844; CX 26-VI, 877; CX 27A-VI, 878; CX 28-VI, 887, 888; emphasis added). Wells was equally emphatic that his pipe would alter "something physical" in the water but that it would leave the chemical structure of the water unaffected (p. 6 above: see also, for example, CX

31A-VI, 896). In the light of this assortment of statements, let us look at Dr. Hoffman's reasoning. First of all, Dr. Hoffman explained that Wells' claim of the catalytic effect's changing "something physical" was scientifically untenable (III, 1118). Next, Dr. Hoffman pointed out that a catalyst cannot cause a reaction to occur; it can merely accelerate an existing reaction (such reaction being chemical, not physical in nature), and where a catalytic action takes place, it is accompanied by a chemical change (III, 1118-1119). Dr. Hoffman also stated that the catalyst must come into actual physical contact with the matter in which the reaction is sought to be produced (III, 1119-1120). On cross-examination Dr. Hoffman stressed that under the present-day state of science he could not possibly envisage that the Evis pipe could be treated so as to "* * * act in a catalytic manner * * *." (III, 1334.)

Commission witness R. E. L. Gildea, who is instructor of civil and sanitary engineering (including the field of water treatment) at the University of Virginia since 1946, and who before 1946 taught these subjects at Virginia Polytechnic Institute for nine years, is also engaged in research in sanitary engineering (V, 3944-3946). He expressed the view that problems of water treatment are primarily of a chemical nature and that a device such as the Evis pipe could have no effect on water without changing "* * * the chemistry of it." (V, 3963-3964, 3966.) The Gildea opinion fully substantiates Dr. Hoffman's explanation that a catalytic effect necessarily implies a change in the chemical structure of the water.

Aside from their conclusion that the Evis pipe has no effect on water, their testimony unmasks an irrecon-

cilable conflict between Wells' assertion, on the one hand, that the device, though producing catalytic action, does not alter the chemical structure, and, on the other hand, that the catalytic effect changes the physical behavior. As noted by Dr. Hoffman, under present-day knowledge there is no principle or theory which could supply any sense to the claims made by petitioner Wells. To accept any endeavors to justify these claims would thus require the exercise of powers of clairvoyance. Unless the Commission had closed its eyes to the opinions of these scientists, it could have drawn no possible conclusion other than that these views constitute substantial evidence, particularly when these opinions remained uncontradicted by any scientific testimony regarding the effectiveness of the Evis pipe.[6]

2. The testimony of scientists reporting the results of tests and experiments and concluding that Evis does not affect water, constitutes substantial evidence.

Turning now to a large number of tests and experiments conducted with the Evis pipe, we find that every one of them corroborates the unanimous scientific opinion that Evis does not perform the purported functions.

Apparently at the request of a representative of the

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[6] Counsel for petitioner, on cross-examination of Dr. Hoffman, for example, for want of any scientist willing to subscribe to counsel's opinion on scientific matters, stated that there is a body of opinion which holds the view that a catalyst could initiate a reaction. Counsel then read into the record some statements from a chemical encyclopedia (III, 1328-1333). Aside from the irrelevancy and incompetency of hearsay testimony given by counsel, the crucial point is that he did not call a single scientist on the stand to contradict Dr. Hoffman's views in the matter.

corporate petitioner (II, 23-24), the Department of Water and Power in the City of Los Angeles ran experiments and tests with the Evis device, all with negative results. This work included tests to determine whether the Evis pipe could, in any way, change the hardness of water, aid in the operation of base exchange softners, improve the taste or odor of water, prevent the formation of scum, or remove scale (II, 12, 14-15, 15-16, 16-17, 109-112). These tests were conducted by experts under controlled conditions with the Evis device installed in accordance with the instructions received with it (II, 2-3, 15-16, 28, 30, 32, 53, 85; CX 2-VI, 818).

The Harbor Department of the City of Los Angeles was interested in finding out whether it could use the Evis pipe in its laboratory to prevent scale deposits and the formation of stains, spots and streaks on glassware after washing (II, 134, 195-196). The tests were conducted under the supervision of an engineer and chemist who has had 25 years of experience in research and in testing materials (II, 193-194, 198). Again the tests were all negative: the pipe had no effect on scale formation, nor did it prevent stains on glassware (II, 138, 140, 143-144, 196-197). And incidentally, no specific written instructions were received with the device, only some literature and verbal instructions that it be installed on the water line in accordance with the arrow on the instrument indicating the flow of water (II, 189, 233).

The Southern California Gas Company, through one of its engineers, a chemist of 30 years' experience (II, 318-319) tried the Evis in several respects, performing, among others tests specifically recommended by peti-

tioners (C X8E-VI, 835). However, these tests did not reveal any differences between Evis-treated and untreated water (II, 322, 326, 327, 328-330). The so-called treated water was water passed through an Evis pipe installed in accordance with instructions set forth in CX 2-VI, 818 (II, 355, 356), which merely required that the Evis be placed on the main supply line next to the water meter and that Evis-treated water not be mixed with untreated water.

Tests were conducted by Dr. Lowell E. Allison, a soil scientist at the United States Salinity Laboratory of the United States Department of Agriculture in Riverside, California. As in the case of the Department of Water and Power of Los Angeles, these tests were performed at the request of someone connected with petitioners, and the pertinent work extended over a period of approximately 60 days (II, 240-241, 242). The object was to determine any effect of Evis-treated water on soil properties and plant growth (II, 236-237). No written, only verbal installation instructions were received with the Evis, and midway through the tests the device was replaced with another Evis pipe by an Evis representative (II, 243, 244). Dr. Allison testified that he could detect no significant differences between the normal water and the Evis-treated water in alkalinity (pH), electrical conductivity, saturation, hydraulic conductivity or moisture retention. Dr. Allison did not find any difference between the two types of water in regard to their effect on the modulus of rupture of soil or on plant growth (II, 238-239; CX 7-VI, 826). It was the opinion of this highly trained and experienced scientist (II, 235-236) on the strength of the data revealed by the tests, that there was no

value in the Evis treatment. So firm was his conviction that he would not further pursue the investigation (II, 305).

At the request of the Better Business Bureau of San Francisco, California, Hugo de Bussieres, as above noted, a chemist and chemical engineer of some 30 years of experience, carried out several experiments which were designed to determine the mechanical and chemical characteristics of the device (II, 478, 482). He was particularly interested in the "dielectric constant" (II, 478), a measure of the internal molecular structure of a substance (II, 486), and tested for those characteristics of water, i.e., conductivity and freezing point, which would change if the dielectric constant changed (II, 486). He found no difference between Evis-treated and untreated water as to freezing point and conductivity (II, 478, 479). In addition, soap hardness and precipitation tests which he conducted did not disclose any dissimilarity in the hardness and in the scaling characteristics of the two waters (II, 479). Nor did he find any difference in the surface tension of the two waters (II, 481). His testimony was that there was nothing "* * * about the device that would cause a change in the characteristics of the water * * *," (II, 482.)

Next, Commission witness Benezra, a chemist of some 14 years of experience (II, 557-558), tested the Evis pipe for its effect on water softness, scaling, and drain streaks on glassware (II, 559-561). He installed the Evis pipe according to the instructions that came with the device, save for some slight modifications in order to control the tests (II, 559; CX 35-VI, 906). The results did not produce any differences between

Evis-treated and untreated water (II, 560-562). He pointed out, in connection with the precipitation tests performed by him to determine the Evis effect on scaling, that such tests are made under conditions almost comparable to those found in a boiler or evaporative condenser in that the heating of hard water will precipitate calcium carbonate and magnesium, which will lodge on the closest surface, thus forming scale (II, 573, 574). He also testified that, under the direction of petitioner Wells, an Evis pipe was installed on a main inlet to the witness' home and that he could find "* * * no difference in the wash or clothes that came out of it." (II, 569.)

Moreover, numerous tests and experiments were performed at Washington State College, Institute of Technology, Division of Industrial Research, initiated at the request of the Better Business Bureau (II, 651). Some of these were conducted in the laboratory; others in field or practical installations. None demonstrated that the Evis pipe was of any value in the treatment of water. As shown by the results of the tests and experiments, the Evis pipe did not change the hardness of water, did not affect the formation of scale in coffeemakers or hot water tanks, the amount of soap used in dishwashers, the removal of iron oxide in water closets, the oxygen or the alkali (pH) content, nor did it aid in the operation of ion exchange (base exchange) softeners (II, 585, 594, 596, 600, 604, 606-607, 617, 623, 848, 849).

Dr. Albrook, Director of the Division of Industrial Research, a chemist (II, 582-583, 643) stated his opinion thus: In the light of the negative results of the tests and experiments, the device will not prevent scale

or depositions of hydrated oxygen, nor will it remove scale or oxygen, nor will it lower hardness of water, nor help zeolites reduce hardness (II, 643). Dr. Mark F. Adams, a research chemist at the Division (II, 844-845) who participated in the laboratory tests (II, 846), stated that in his opinion, based upon all the facts he was able to obtain from the experiments and based upon his knowledge and experience, "* * * the Evis water conditioner does not have any effect on the scaling properties of water, the softness or hardness of water, or in any way affects the water that passes through it." (II, 853-854.)

Of signal importance was the series of infrared spectroanalyses of Evis-treated and untreated water samples made by George D. Wagner, Jr., also a member of the staff of the Division of Industrial Research (II, 883). The Wagner analyses by infrared spectrograms revealed that the molecular configuration and geometrical arrangement of the molecules of Evis-treated and untreated water were identical, since the spectrograms of the two waters were the same (II, 887; CX 47A and B-VI, 934-936). It is this characteristic of the water, if any, that would have been changed if any effect had been or were to be obtained in the Evis treatment. In the words of petitioners: "* * * Evis always performs at its top efficiency *because the delicate change of molecular organization established by EVIS-izing* is then freed from the interference of electric currents." (RX 34-VI, 1011; emphasis added.) Yet the spectrograms demonstrated that there was no difference between "the molecular organization" of Evis-treated and untreated water (II, 888, 918-919). And it should be noted in passing that this test fully bears out the

views expressed by Commission witness de Bussieres, who concluded from the identity of freezing point and conductivity of Evis-treated water and untreated water that the dielectric constant of the two types of water would therefore also be identical (p. 17 above).

Dr. Robert C. Weast, associate professor of chemistry and chemical engineering at Case Institute of Technology (III, 983-985), conducted tests to determine whether or not the Evis pipe would remove scale from scaled water pipes (III, 986-987). Dr. Weast's work took thirty weeks. He installed the Evis device (CX 50-VI, 944), and after the first, third, ninth, twenty-third and thirtieth week, he removed portions of pipe in the Evis line and in the control line, and each section was cut in half and photographed (CX 51 and CX 52, A through D).[7] A screen was placed at the bottom of the pipe line with the Evis device in order to entrap any scale loosened by the action of the Evis (III, 990). But Dr. Weast never found any solid matter entrapped in the screen (III, 990), nor could he discern any decrease in the amount of scale in the pipe during the thirty-week test (III, 990). In his opinion, therefore, "* * * the Evis unit does not remove scale from previously scaled pipes." (III, 996.)

Dr. James I. Hoffman who, as hereinabove noted, could not visualize any scientific basis for the Evis claims, also performed, and participated in the observation of, tests which fully supported his opinion testimony that the Evis pipe could have no effect upon water. Thus, he tested the Evis pipe as to whether it

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[7] CX 51 and CX 52, A through D are physical exhibits representing six and four colored photographs, respectively, of sections of pipe.

would cause the removal of scale, by placing it in a piping system for 68 days. Thereafter, he disconnected the test and control pipes. The pipes used were photographed and weighed before and after the tests. Neither was there any significant change in weight nor did Dr. Hoffman find any removal of scale (III, 1132-1135, 1137; CX 54-VI, 948-949; CX 55-VI, 951-952). Dr. Hoffman also observed the result of the surface tension test, which showed that the Evis pipe did not change the surface tension of water (III, 1124-1125, 1349).

In the light of petitioners' claims that the Evis pipe alters "something physical" in the water, Dr. Hoffman pointed out that energy would be required to change the normal physical characteristics of water but that the Evis pipe did not supply energy to the water passing through it (III, 1139-1141). And as to the scientific possibility of a conversion of energy, postulated by counsel for petitioners on cross-examination, that could bring about a change of the physical characteristics of water, Dr. Hoffman stated that such a possibility would be beyond his comprehension (III, 1338-1339). Indeed, he unequivocally testified that, on the basis not only of his scientific knowledge and experience but also of the tests performed with the Evis pipe, the device "* * * can have no effect on water." (III, 1144-1145.)

Upon remand of the case to the Examiner (p. 4 above), extensive tests of the Evis device were undertaken by the Engineering Experiment Station of the University of Virginia. These tests were conducted under the supervision of R. E. L. Gildea, who, as noted above, is a civil and sanitary engineer and has spent

many years in teaching civil and sanitary engineering at the university level and whose courses include instruction on water treatment, water-treatment processes, and water analysis and laboratory work in analytical procedures which are recognized as standard and acceptable methods for the analysis of water (V, 3944-3945, 3957-3958). Mr. Gildea submitted a report of the results of these tests (CX 64-VI, 965-1008). The experimental work was performed by Dr. L. B. Johnson, Jr., a member of the staff of the Engineering Experiment Station, who is a research engineer holding degrees in chemistry and meteorology, including a Ph.D. in physical chemistry (V, 3787-3788).

The purpose of the tests was to determine whether the Evis pipe would prevent scaling, remove previously formed scaling, reduce the amount of water used in laundering, remove entrained gases from water and prevent or lessen corrosion caused by water (V. 3793; CX 64-VI, 971-973, 973-974, 974-976, 976-978). Seven Evis pipes in all were used in the tests. Dr. Johnson installed five of them in accordance with the instructions contained in CX 57-VI, 954, and two pursuant to the directions given in CX 58-VI, 956-959 (V, 3790-3792). The results of the tests, which extended over a period of several months, were as follows. There was no difference between Evis-treated and untreated water with respect to the prevention or removal of scale, the amount of water used in laundering, the prevention or lessening of corrosion and the removal of entrained gases (V, 3795-3796, 3802, 3806-3808, 3811; CX 64-VI, 979-993). It was also found from the laundering tests that the use of the Evis pipe did not change the amount of soap required in laundering (V, 3823).

In summing up his conclusions Dr. Johnson stated "* * * that the characteristics of the water would not differ whether they passed through an Evis unit or whether they did not." (V, 3836-3837.)

In addition to these tests, Mr. Gildea made extensive comparative analyses and studies of Evis-treated and untreated water (CX 64-VI, 994-1007). They reveal that the Evis pipe has no effect on water that has passed through it (CX 64-VI, 1006-1007). Of particular significance is the "Total Dissolved Solids" analysis (CX 64-VI, 996-997), which demonstrates that the Evis pipe does not cause any conversions of the solids present in the water, such as from a state of solution to one of suspension (V, 3950-3951). This, in turn, shows that the Evis does not change the characteristics of water insofar as total dissolved solids are concerned. Even more important is Mr. Gildea's conductance analysis, which disclosed that the specific conductance of water is uninfluenced by passage of water through the Evis device. This result has been described in the report as "very significant" (CX 64-VI, 1004). Indeed, the pertinent finding is telling because it fully substantiates the results of Dr. Allison's and de Bussieres' conductivity tests and constitutes additional confirmation of the Wagner spectroanalysis, which revealed that the molecular configuration of Evis-treated water does not differ from that of untreated water (pp. 16, 17, 19 above). The data which Mr. Gildea prepared represent further verification of his opinion that the Evis device cannot have any effect upon water unless it alters the chemical structure of the water, and the analysis he made demonstrates that the Evis causes no chemical change (V, 3966).

In short, the views expressed by the scientists and the conclusions drawn by them from the tests and experiments corroborate each other. Every one of them confirmed, and concurred with, the observation that the Evis pipe has none of the beneficial effects on water claimed by petitioners. On the basis of the uniformity of scientific opinion as to the ineffectiveness of the Evis pipe, which, as more fully developed below, is not contradicted by any views of other scientists, the Commission was fully warranted in accepting the scientific opinion testimony and the conclusions drawn from the results of tests and experiments as highly substantial evidence. It completely sustains the decision that petitioners' representations concerning the Evis pipe are false, misleading and deceptive.

B. Petitioners' contentions, which rest almost exclusively on conflicting consumer testimony, are without merit.

Some 91 witnesses testified on behalf of petitioners that they obtained beneficial results from the use of the Evis pipe (Pet. App. B).[8] On the other hand, the record also shows that 3,000 other users, had they been called to the stand, would have testified that the Evis pipe was a failure. This is conceded by petitioners and must be regarded as an admission against interest. The further assertion by petitioners that 97% of the Evis users were satisfied is strictly a self-serving dec-

[8] While 100 witnesses are listed in Appendix B to petitioners' brief, four of them are Evis distributors, namely witnesses Moran, Tudury, Herwig and Grimm; one, viz., Simington, sold the Evis device at the time he conducted experiments (IV, 3328-3329); three, i.e., Frantz, Sirine, and Hasbrook, testified as to laboratory tests only; and O'Connell acted as consultant to counsel for petitioners for the purpose of this case but was not asked a single question about the use of Evis.

laration (V, 3764-3765). Moreover, it should be borne in mind that user or customer satisfaction can never excuse deceptive practices. *Erickson* v. *Federal Trade Commission,* 272 F.2d 318, 322 (7th Cir. 1959); *Independent Directory Corp.* v. *Federal Trade Commission,* 188 F.2d 468, 471 (2d Cir. 1951). Thus, insofar as consumer testimony is concerned, the record reflects conflicting evidence.

As for scientific proof in support of petitioners' contentions, the only submission of a scientific nature contained in the record was that relating to a series of tests run at Peninsula Laboratories, Mountain View, California. The tests, which included a washing-machine experiment, were supervised by Howard Frantz, a chemist and partner of Peninsula Laboratories, and were performed by chemists Gloria F. Sirine and Walter Hasbrook, Jr. (IV, 2500-2502, 2505, 2527, 2849-2851, 3227, 3228). From a scientific standpoint, the testimony was clearly inconclusive. Frantz stated: "Frankly, I haven't seen enough evidence to state as a scientist that I have seen there is proof that the Evis unit does do it * * *." (IV, 2803.) "As a scientist, I can't say for sure. * * * I am not prepared to say my mind is made up that the Evis was the cause of it." (IV, 2806.) Frantz also testified that the absorbol filtration test, concerning the percolation of water through fuller's earth, was *not* a conclusive experiment (IV, 2817).

The only additional scientific testimony was that of William J. O'Connell, a chemical engineer, who acted as a consultant to counsel for petitioners in connection with this case (IV, 2955). The tenor of his testimony, however, must be evaluated in the light of the fact that

preceding and following him on the stand were consumers whose testimony was designed to prove the beneficial results of the Evis pipe as claimed by petitioners (See Br. pp. 3-25). Consequently, it was to be expected that consultant O'Connell would testify in the vein of those consumers that the Evis produces beneficial results. Nevertheless a perusal of his testimony reveals one of the striking aspects of this case: he, the scientist, was not asked a single question by counsel for petitioners about the operation of the Evis, about any possible scientific law or principle underlying its operations, or about the beneficial effect of Evis on water (IV, 2955-2977, 2985-3032, 3045-3050; see also Pet. Br. pp. 47-56).

Frantz' testimony demonstrates that as a scientist he could not state that there was enough proof to justify the claimed effect of Evis. O'Connell observed sepulchral silence in this respect. Thus, the record contains no scientific testimony of any scientist which would flatly contradict the opinions, views and conclusions of the scientists that the Evis pipe has no effect on water. In the light of such a record, which does not even present the problem of conflicting scientific testimony as to the ineffectiveness of the Evis pipe, the applicable principles of law are clear and unequivocal.

Decisional law, dating back many years, has established that it is for the Commission to weigh the evidence and draw the inferences therefrom. *Federal Trade Commission* v. *Pacific States Paper Trade Assn.,* 273 U.S. 52, 63, (1927); *Federal Trade Commission* v. *Algoma Lumber Company,* 291 U.S. 67, 73 (1934); *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U.S. 726, 739 (1945); *Federal Trade Commis-*

sion v. *Staley Mfg. Co.,* 324 U.S. 746, 760 (1945); *Federal Trade Commission* v. *Sewell,* 353 U.S. 969 (1957); *Carter Products, Inc.* v. *Federal Trade Commission,* 268 F. 2d 461, 494-495 (9th Cir. 1959), *cert. denied,* 361 U.S. 884 (1959); *Erickson* v. *Federal Trade Commission, supra,* 272 F. 2d at 321. A corollary of this basic precept is the rule that the courts will not invalidate inferences drawn by an administrative body simply because they might have reached a contrary result. *Federal Trade Commission* v. *Pacific States Paper Trade Assn., supra,* 273 U.S. at 63; *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.,* 316 U.S. 105, 106 (1942); *National Labor Relations Board* v. *Southern Bell Telephone Co.,* 319 U.S. 50, 60 (1943); *Vacu-Matic Carburetor Co.* v. *Federal Trade Commission,* 157 F. 2d 711, 713 (7th Cir. 1946), *cert. denied,* 331 U.S. 806 (1947); *Allied Paper Mills* v. *Federal Trade Commission,* 168 F. 2d 600, 605 (7th Cir. 1948), *cert. denied,* 336 U.S. 918 (1949). A further principle which has emerged from the foregoing general legal criteria is that it is within the province of the Commission, not that of the courts, to resolve conflicting evidence. *Carter Products, Inc.* v. *Federal Trade Commission, supra,* 268 F. 2d at 496; *Vacu-Matic Carburetor Co.* v. *Federal Trade Commission, supra,* 157 F. 2d at 713.

In the instant situation, there is conflicting user testimony and uncontradicted scientific testimony on behalf of the Commission's case that the Evis has no effect on water. Thus, the legal answer to the issue raised here is given by these court decisions of which the underlying facts in *Vacu-Matic* most strongly resemble the record at bar. In *Vacu-Matic,* petitioner offered a de-

vice claiming that it resulted in saving of gasoline. The petitioner presented consumers who testified that they had experienced a marked saving of gasoline. The petitioner also introduced expert testimony *to the same effect.* On the other hand, the Commission did not offer testimony from any user to the contrary, notwithstanding the fact that more than 200,000 units of the device had been sold. (Evis Manufacturing Company had sold approximately 100,000 Evis units (II, 406).) The Commission in *Vacu-Matic* relied "* * * in support of its case, upon the testimony of a number of highly trained and qualified experts who had made every recognized test and who uniformly testified in substance that there was no merit in petitioner's device." 157 F. 2d at 713. The court concluded that this evidence was entirely "* * * sufficient to support the Commission's finding." 157 F. 2d at 713.

In *Vacu-Matic* there was not conflicting *user* but contradictory *expert* testimony, and the court ruled that this was a matter for the Commission to resolve even though the court, on the basis of the record, could have reached a different conclusion. 157 F. 2d at 713. Here we are faced with conflicting user but uncontradicted expert testimony as to the ineffectiveness of Evis on water. Thus, the present facts lend an even greater support to the *Vacu-Matic* rationale than did the record in that case.

That the Commission's scientific testimony presented in the instant case is *substantial* evidence is corroborated not only by *Vacu-Matic* but also by a long line of Commission cases concerning the question of substantiality of scientific evidence. For example, in *Justin Haynes & Company* v. *Federal Trade Commis-*

sion, 105 F.2d 988 (2d Cir. 1939), *cert. denied,* 308 U.S. 616 (1939) the court expressed these views:

> These findings are supported by the testimony of the three expert witnesses called by the Commission; and in the light of such testimony there can be no doubt that the petitioner's advertisements were grossly exaggerated and misleading. *It is true that these witnesses had no personal experience with Aspirub and based their opinions upon their general medical and pharmacological knowledge.* They were, however, well-qualified expert witnesses, *and the fact that other experts called by the petitioner expressed a contrary opinion and testified to experiments cannot enable the petitioner to contend successfully that there was no substantial evidence to support the Commission's findings.* That this court is not permitted to pass upon the weight of the evidence is too well established to require the citation of authorities. [105 F. 2d at 989; emphasis added.]

Aside from the fact that the *Haynes* case presented a situation of conflicting expert testimony, it is of great significance in the instant case inasmuch as the court there held that scientists need not have personal experience with the product involved in order for their opinions to be accepted as substantial evidence. Of *identical import* are these decisions: *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Commission,* 111 F. 2d 889, 891 (7th Cir. 1940); *Neff* v. *Federal Trade Commission,* 117 F. 2d 495, 496-497 (7th Cir. 1941); *John J. Fulton Co.* v. *Federal Trade Commission,* 130 F. 2d 85, 86 (9th Cir. 1942), *cert. denied,* 317 U.S. 679 (1942); *Segal Lock & Hardware Co.* v. *Federal Trade Commission,* 143 F. 2d 935, 937 (2d Cir. 1944), *cert. denied,*

323 U.S. 791 (1945); *Irwin* v. *Federal Trade Commission,* 143 F. 2d 316, 323-324 (8th Cir. 1944); *J. E. Todd, Inc.* v. *Federal Trade Commission,* 145 F. 2d 858 (D.C. Cir. 1944); *Bristol-Myers Co.* v. *Federal Trade Commission,* 185 F. 2d 58, 61-62 (4th Cir. 1950); *Carter Products, supra,* 268 F. 2d at 496; *Erickson, supra,* 272 F. 2d at 321; see also *United States* v. *One Device, etc.,* 160 F. 2d 194, 197-200 (10th Cir. 1947); *Goodwin* v. *United States,* 2 F. 2d 200-201 (6th Cir. 1924).

In every one of these cases, except for the two mentioned last, the Commission was confronted with conflicting scientific testimony, and in all of them the courts, including this Court, have invariably and consistently held that the scientific testimony on behalf of the Commission must be regarded as substantial evidence and that the resolution of any conflict in such testimony is for the Commission, not the courts.[9] Again, we must stress that in the instant case there was no conflicting scientific testimony as to the ineffectiveness of the Evis on water and that the unusually meager scientific testimony introduced by petitioners did not flatly contradict the conclusion of the Commission's witnesses that the Evis pipe does not affect water. Consequently, the controlling legal principles applicable to the instant record make it abundantly clear that the evidence upon which the Commission relied was substantial in every sense of the word. *And this is true regardless of whether or not the scientists performed any tests with the Evis pipe.*

What then is the position of petitioners vis-a-vis the

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[9] See also *P. Lorillard Co.* v. *Federal Trade Commission,* 186 F. 2d 52, 56-57 (4th Cir. 1950); *Segal* v. *Federal Trade Commission,* 142 F. 2d 255 (2d Cir. 1944).

substantiality of the Commission's evidence and their failure to introduce countervailing scientific evidence regarding the effectiveness of Evis on water? Because of the absence of such countervailing evidence they were compelled to rely upon user testimony and have thus devoted the first portion of their brief to the recital of user plaudits (pp. 3-25), without a single reference anywhere in their entire brief to their only scientific testimony concerning the Evis operation, i.e., that of the chemist Frantz, which in itself is of telltale significance.[10] Petitioners then criticize the lack of consumer testimony in support of the complaint (Br. 25-26). In the first place, on the basis of the record, 3,000 users, had they been called, would have testified to the failure of Evis, thus overwhelmingly contradicting petitioners' consumer witnesses. But above all, there is no requirement for the Commission to make its holding contingent upon consumer opinion.[11] In *Vacu-Matic,* the Commission specifically abstained from calling users of the device even though petitioner presented consumers testifying to its beneficial effect. Nonetheless, the court ruled that the Commission's scientific

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[10] Petitioners' only reference to the work of Peninsula Laboratories is in a footnote (Br. 25).

[11] It is well settled that the Commission is not required to sample consumer opinion and that it has a fundamental right to draw its own conclusions as to whether representations are false, misleading and deceptive. *E. F. Drew & Co.* v. *Federal Trade Commission,* 235 F. 2d 735, 741 (2d Cir. 1956), *cert. denied,* 352 U.S. 969 (1957); *New American Library* v. *Federal Trade Commission,* 213 F. 2d 143, 145 (2d Cir. 1954); *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission,* 143 F. 2d 676 (2d Cir. 1944); *Zenith Radio Corporation* v. *Federal Trade Commission,* 143 F. 2d 29, 31 (7th Cir. 1944); *Federal Trade Commission* v. *Hires Turner Glass Company,* 81 F. 2d 362, 364 (3d Cir. 1935).

evidence, without supporting consumer testimony, constituted substantial evidence, ~~citation.~~ Moreover, we have shown above that the opinions, conclusions and views of scientists, though not based on experience with the product in question, must be held to be substantial evidence. Therefore, the Commission's reliance upon scientific expert testimony in the instant situation is fully sustained by every one of the decisions cited above. Petitioners' criticism of the absence of consumer testimony hence is entirely without merit.

Since petitioners were forced to rest their defense upon conflicting user testimony and were unable to meet the Commission's scientific evidence, they sought to minimize the impact of that evidence by attacking the tests and scientists who conducted them. The principal thrust of petitioners' contention is directed against the alleged failure of the scientists to observe installation instructions and against the alleged irrelevance of the tests and experiments carried out by these Commission witnesses (Pet. Br. at pp. 26, 31-33, 42-47, 66-71, 76-78). Yet the very standards which petitioners invoke in support of their argument were not observed in a large number of installations which their consumer witnesses described as successful. In order fully to show the weakness of the assertions regarding the importance of these instructions, we shall briefly discuss them.

1. Petitioners issued varying sets of instructions at various times, each set superseding and modifying the previous one.

Petitioners contend that their instructions were contained in two bulletins (Br. p. 76). This is completely refuted by the record. In what appears to be one of the

first circulars regarding Evis (CX 29A-VI, 890) the device is merely described as a "pipeline fitting" without any special instructions for its installation. Another early pamphlet simply calls for the installation of the Evis pipe on the main service line of the house with the admonition not to place it on the hot water line and not to mix Evis-treated water with untreated water (CX 2-VI, 818). Next, according to the record, is a bulletin of September 1, 1952 (CX 8A through F-VI, 827-837) which contains about 10 different instructions regarding the installation, including the direction not to install the Evis on pipelines carrying heated water and not to mix Evis-treated with untreated water and, if possible, to consider electrical grounding of the pipe system on which the Evis device is to be installed (CX 8C-VI, 831-832). A pamphlet dated July 15, 1953, contains, on its last page, drawings depicting the points at which the Evis pipe should be installed without any further instructions (CX 21-VI, 864). Another circular, undated, contains instructions for installing air-conditioning and refrigeration equipment; however, it confines itself almost exclusively to grounding procedures and consists of about eight directions but omits entirely the prohibition of mixing Evis-treated with untreated water (CX 22D-VI, 871). Another Bulletin is that of July 20, 1953, containing seven directions (CX 27B-VI, 881).

A further circular, also issued in 1953 but omitting the precise date of publication, contains two instructions regarding installation, one requiring that Evis-treated and untreated water not be mixed and the other calling for adequate grounding (CX 31C-VI, 898). There is no further reference in the bulletin to the

other instructions contained in previous issues. In contrast to the previous circulars and pamphlets, this information sheet discusses for the first time laboratory procedures and their purported limitations and recommends that *practical* tests be performed. The circular objects to laboratory experiments and refers to a whole series of what it characterizes as "misguided" tests. It warns that reports not authorized by petitioners should be carefully examined (CX 31C through D-VI, 898-900). It is not unfair to comment here that these statements were quite obviously designed to counter the negative results of the tests performed by scientists during 1952 and early 1953 and to anticipate and insulate petitioners against possible criticism.[12] Furthermore, the instructions for tests, such as "no cross-connection piping" (CX 31C-VI, 898-899), appear nowhere in any of the later bulletins hereinafter considered. Nor were these instructions contained in any of the previous bulletins. This fully exposes the flimsiness of petitioners' charges on pages 46-47 of their brief that the scientists disregarded the instructions

[12] It should be recalled here that, at the request of a representative of petitioners, the Department of Water and Power of Los Angeles conducted tests in July, August and September, 1952, with negative results; that the Southern California Gas Co. performed tests in February and March, 1953, with negative results; that, again at the request of a representative of petitioners, Dr. Allison at the United States Salinity Laboratory of the United States Department of Agriculture in Riverside, California, conducted tests commencing February, 1953, with negative results; that the chemist de Bussieres, at the request of the Better Business Bureau, performed tests in 1952, again with negative results; and that, at the request of the Better Business Bureau, the Division of Industrial Research, Institute of Technology, Washington State College, performed tests as early as March, 1952, with negative results (II, 5, 120; CX 9A-VI, 839; CX 11A through B-VI, 842-843; II, 242, 478, 482-483, 584, 654).

that there should be "no cross-connection piping." Those who conducted tests before the date of publication could not have known of these fabricated requirements, and those who performed tests after 1953 could not have known these instructions because they were not contained in any of the later bulletins.

Another bulletin relating to instructions is that of July 31, 1953 (RX 34-VI, 1009-1012), containing schematic sketches, emphasizing the importance of electrical grounding and setting forth eight general directions, some of which—such as those relating to the installation of Y-type strainers—are not contained in previous instructions (RX 34-VI, 1010). Still another installation pamphlet was issued on January 1, 1954, and was devoted principally to grounding procedures and illustrating them by schematic sketches (CX 58-VI, 956-959; identical with RX 52-VI, 1021-1024).

The last bulletin contained in the record is that of 1956 (CX 57-VI, 954-955). This bulletin is especially noteworthy since it omits entirely every one of the instructions involving grounding procedures.

Hence, it is obvious from the foregoing recital that none of the bulletins contain all of the so-called instructions which petitioners claim to have developed during the period under review with the purported objective of assuring proper operation of the Evis.

It is particularly important to point out at this juncture that petitioners choose to criticize the absence of what they label as "proper grounding" of the various test installations (Br. 46-47), even though their last bulletin completely fails to apprise the public of the necessity of grounding. This in itself is an indication that they did not regard grounding as important, thus

fully sustaining the views of Commission witness Dr. Hoffman (III, 1259). And it is well to recall here because of what petitioners' late president, Joseph T. Voorheis, had to say about proper installation procedure (CX 34-VI, 905): "The plumber who installs the Evis units will usually place it so the water flows in the direction of the arrow although if he should make a mistake it would make no difference." This, if nothing else, clearly indicates, they did not attach such significance to installation instructions as they would ~~would~~ like the Court to believe.[13]

2. Many installations of petitioners' own user witnesses were not made pursuant to the instructions.

As hereinabove noted, petitioners have criticized the various tests because the Evis pipe was not installed according to their instructions (Br. 26, 32, 42-47, 67-71, 74-78). First of all, petitioners concede that Dr. Allison's installation was made pursuant to the instructions (Br. 26, 44), presumably because they claim the results of his tests as being in favor of Evis—an assertion which, as more fully considered below, is completely contrary to Dr. Allison's own opinions and conclusions drawn on the basis of these tests. Next, many of the Commission's witnesses testified that in installing the Evis device they adhered to the then available instructions (II, 30, 189, 233, 341, 355-356, 521, 533, 556; III, 1077-1078, 1232, 1269; V, 3790-3792).

Some of the Commission experts also noted that ob-

[13] It is interesting to note that, for example, bulletin RX 34-VI, 1009-1012 was allegedly prepared at a meeting of 30 representatives of petitioners, the bulletin being dated July 31, 1953 (Br. at 44). Yet the above-quoted statement of J. T. Voorheis was made on September 11, 1953 (CX 34-VI, 905).

servance of the installation instructions would have had no effect upon the results of their tests—a view in which, as quoted above, petitioners' late president certainly would have concurred (II, 33, 216, 483; III, 1259). Moreover, there is no more significant support for this position than petitioners' omission of the grounding requirements in their 1956 bulletin and their failure to advise either before or after 1953 those who desired testing the Evis device in laboratories about the "no cross-connection" instruction and the numerous other test guides published, according to the record, only once in 1953 but not during subsequent years (CX 31C-VI, 899-900). Furthermore, many installations which were described by petitioners' user-witnesses as successful had *not* been fitted in accordance with the instructions.[14] In many of these instances the requirement of grounding was not observed.[15] Several consumer witnesses testified that they had not received any instructions.[16] In at least three instances witnesses installed a cast-iron Evis on copper piping, contrary to the instructions set forth in CX 57-VI, 954; CX 58-VI, 957 (III, 2104; V, 3487, 3688). In some installations Evis-treated water was mixed with untreated water (IV, 3114, 3131, 3385-3386, 3388), in direct contravention of what purports to be one of petitioners' most important instructions (see p. 33 above). In two

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[14] III, 1756, 1757, 1764, 1794, 1795, 1797, 1885, 1960, 1972, 2052, 2104, 2186-2187; IV, 2290, 2320, 2339, 2582-2583, 2616-2617, 2761, 2771-2772, 2783-2784, 3075; V, 3435, 3483-3485, 3538, 3578, 3609-3610, 3622, 3639, 3667-3668, 3688.

[15] III, 1794, 1795-1797, 1885, 1960, 2290; IV, 2616-2617, 3075; V, 3435, 3484-3485, 3537, 3556, 3578-3579, 3609-3610, 3622, 3639, 3667-3668, 3701.

[16] IV, 2320, 2339, 2595, 2697, 2783.

instances hot water passed through the Evis pipe (IV, 3385, 3388; V, 3428), again contrary to installation instructions.[17] And many of the witnesses did not at all observe the installation of the Evis pipe.[18]

With regard to most user installations the consumer testimony was confined to "before and after" results, thus making a concurrent comparison between Evis-treated and untreated water impossible. Consequently any one of a number of factors unrelated to the Evis pipe could have caused changes leading to different results. For example, in many cases consumer witnesses discontinued the use of water softeners or chemicals after the installation of the Evis pipe.[19] Thus, it is a matter of pure speculation whether the Evis pipe or the discontinuance of softeners or chemicals caused a change in conditions.

Many of petitioners' consumer witnesses testified about changes in the water supply or the use of different water sources.[20] Others did not know whether there was a change in the water supply or whether the water used by them was being treated, nor were they cognizant of the identity of their water source.[21] These factors may well have contributed to a change in the water

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[17] CX 2-VI, 818; CX 8C-VI, 832; CX 27B-VI, 881.

[18] III, 1803, 1833, 1885, 1958, 2202-2203; IV, 2581, 2835, 3361.

[19] III, 1816-1817, 1852-1853, 1883, 1896, 1938-1939, 2000, 2024, 2134, 2167, 2216, 2255; IV, 2278, 2395, 2422, 2602, 2675, 2767, 2783, 2841, 3067, 3083, 3106, 3123, 3183, 3207, 3222, 3244, 3331, 3344-3345, 3396, 3400; V, 3429, 3473, 3529, 3591-3592, 3624.

[20] III, 1944, 2061; IV, 2384, 2402, 2662, 2761, 2782, 2887-2888, 3087-3088, 3250, 3342-3343, 3404; V, 3429, 3458, 3488, 3555, 3584-3585.

[21] III, 2240, 2252, 2262; IV, 2286-2287, 2367, 2480, 2559, 2579-2580, 2695, 3070, 3139, 3186, 3361; V, 3538, 3541.

regardless of the installation of the Evis pipe. As pointed out by petitioner Wells: "It has been found that if the salt content of the water suddenly increases, that sometimes scale which has taken a year to build up will come off in a matter of weeks. That has been known to happen many times." (II, 460.) Of course, none of the users could explain how and why Evis affected the water.

Small wonder, in the light of such a state of the record, that the Commission could attach little value to the user testimony (I, 816). But what is even more significant, petitioners' charges of grave defects of the scientific tests due to failure to follow instructions are not only wholly unfounded but also completely meaningless in view of the fact that in a large number of Evis installations petitioners' directions were simply not observed. Moreover, as we have demonstrated above, the instructions purportedly governing tests were published only once, i.e., in 1953. Scientists could not possibly have known about them before the date of publication; as for tests performed after the date of publication, it must be pointed out that none of the later bulletins, insofar as the record discloses, contained these instructions.

3. Petitioners' attacks upon the tests and the scientists are unwarranted.

One of the striking features of petitioners' brief is, as noted, their complete silence in regard to the only scientific evidence they presented on the question whether the Evis pipe does in any way affect water, i.e., the testimony of the chemist Frantz that the evidence of Evis' effectiveness is inconclusive (p. 25 above).

Instead they have copiously cited the testimony of consultant O'Connell, who ranged far and wide on the subject of water treatment but carefully abstained from the crucial issue of this case, namely, whether there are any scientific principles or any scientific laws which explain the functioning of the Evis pipe, and above all whether the Evis pipe has any effect on water.

Accordingly, the dearth and inconclusiveness of petitioners' scientific evidence, their inability to rebut the Commission's evidence by any scientist—and we emphasize *any* scientist who would have been willing to state under oath that Evis has an effect on water—has compelled them to devote most of the brief to attacks upon the tests and upon the scientists who testified on behalf of the Commission (Br. pp. 26-42, 44-46, 52, 53, 65-71, 76-78). Without unduly burdening the Court, we shall point out some samples of petitioners' tactics.

For example, petitioners claim that Dr. Allison's soil-properties and plant-growth tests, which, they state, were performed in accordance with their instructions (Br. 26, 44), disclosed beneficial differences in favor of the Evis pipe (Br. 36-38). Consider Dr. Allison's testimony regarding all of these claimed differences which petitioners did not dare to have interpreted by either chemist Frantz or consultant O'Connell:

By Mr. Downs:

> Q. Counsel has gone through these charts and tables and pointed out a few discrepancies, doctor. Taking all of these into consideration, in your work on these projects, based on your experience, education, and knowledge of the subject, what is your opinion as to value of the Evis Water Condi-

tioner in the improvement of the texture of, or structure of soil or in the growth of plant life?

* * * *

THE WITNESS: Well, I can answer that question only on the basis of the data we obtained from this experiment; solely that; that these differences that have been brought out are very minor in most cases, practically all cases; that the differences, for instance, in salinity in favor of one kind of water and another were at a low level of salinity, where the amount of salinity present wasn't a very serious factor in plant growth. I know that was just a slight saline soil where all plants, with a few exceptions, would grow in it, so far as the salinity factor is concerned. I should point out that most of the change in reclamation, that is, lowering of the exchangeable sodium percentage, was due to the gypsum entirely and in the absorption of gypsum. There was no difference between the ESP for Evis water as compared with raw water.

* * * *

* * * As for improvement of structure and texture of the soil, you cannot improve the texture of the soil. That is a fundamental property of soil that is unchangeable, so the use of that term is not valid here. You can change the structure of soil and in regard to the data that I presented, the only measurement that bore upon that were the modulus of rupture and as I pointed out although that data is not in the report—we had the data—there was no difference due to treatment of the water in the term of modulus of rupture. So that, based on the limited data I have, I can see no change in structure through the use of Evis treated water * * *.

* * * *

> My concise opinion, based primarily upon the data I presented and in the terms of that data and the result drawn from it, Mr. Downs, is we saw no value in the treatment, in the treatment of the water; so much so that I would not pursue the investigation further. (II, 301, 303, 304, 305.)

These are Dr. Allison's concise conclusions of the results of his tests. Regardless of petitioners' interpretation, the truth of the matter is that the expert concluded from the data which he had gathered that the Evis treatment of water is of no value whatsoever. What is of equally far-reaching significance, there is no expert statement in the record which shows a contrary conclusion drawn from these data.

Petitioners charge that the freezing-point and conductivity tests performed by the chemist de Bussieres have no bearing whatever on any Evis claims and that the spectroanalysis which the spectroscopist Wagner made of treated and untreated water does not have the slightest relevance to their claims (Br. 33-34). As we have pointed out above (pp. 19-20), the purpose of these tests was to determine whether, as asserted by petitioners, the "EVIS-izing" would establish a delicate change in the molecular organization of water (RX 34-VI, 1011). These tests proved, as was also fully substantiated by Dr. Allison's experiments and the Gildea analysis, that there were no differences between the molecular configuration of Evis-treated water and that of untreated water and therefore no structural dissimilarities, either physical or chemical. Thus, these tests were extremely important inasmuch as they exposed the falsity of petitioners' claims that

the Evis pipe would cause a physical change in water (see pp. 6, 12 above).

Another illustration of petitioners' tactics is their attack upon Dr. Weast's tests and testimony (Br. 38-40). It will be recalled that Dr. Weast conducted experiments to find out whether or not the Evis pipe would remove scale and testified thus:

> A. We only attempted to prove if it would remove the type of scale as formed in our own Cleveland water.
>
> Q. And that is what you refer to as "rusty type of scale"; is that correct?
>
> A. That is right.
>
> Now, this does not mean that the scale consists only of rust. I have testified that we did not perform a chemical analysis on the scale. But I am confident that that scale consists of the other insoluble materials that have been found by previous analysis in Cleveland cold water scales. It is highly colored from the rust and might appear to consist only of rust, but by analysis, I am confident that it would show it has other chemicals in it. (III, 1027-1028.)

Cleveland's water was described by Dr. Weast as causing corrosion, which in turn produces a rusty type of scale (III, 1008). While petitioners did not specifically state in their advertisements that Evis would remove encrustation resulting from corrosion, on the basis of the information supplied in these advertisements, petitioners, in the words of Dr. Weast, "* * * gave the impression that it would remove scale from scaly pipes [and] I see no reason why it would work in

other cities and not work in Cleveland."[22] (III, 1058.) "It is my impression that inasmuch as the statement was not limited, it was inclusive of all types of water." (III, 1058.) Petitioners' only defense to this perfectly justified deduction is, in substance, that they did not advertise that Evis would also remove the Cleveland type of scale (Br. 39-40). This excuse is both ridiculous and frivolous, especially in the light of the statements contained in their advertisements and bulletins that Evis combats or eliminates corrosion (CX 8D-VI, 834; CX 17-VI, 851; CX 18-VI, 854; CX 26-VI, 877; CX 27C-VI, 882-883; CX 28-VI, 888; CX 30-VI, 895).

Typical of the methods used by petitioners is their attack upon Dr. Hoffman, whose opinion and tests have been presented and described at pages 12-13, 20-21 above. They state in their brief (p. 34):

> * * * First, after long, critical and even embarrassing examination, he admitted that his surface tension test had been incorrectly conducted and for that reason "should be summarily discarded as valueless". (III, 1360, 1362.)

The *embarrassing* aspect of this characterization of Dr. Hoffman's views is that petitioners attribute to him a statement he never made. The portion quoted by petitioners was taken from a text written by Dr. Dorsey (III, 1358, 1360); and as to Dr. Dorsey's observations, Dr. Hoffman had this to say:

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[22] Of course, petitioners could never deny their claim that Evis will remove scale (see CX 2-VI, 818; CX 8C-VI, 831; CX 8D-VI, 833; CX 12-VI, 844; CX 13-VI, 845; CX 14-VI, 846; CX 17-VI, 851; CX 18-VI, 853; CX 26-VI, 877; CX 27B through C-VI, 881-882; CX 28-VI, 888; CX 30-VI, 893; CX 31A-VI, 896; CX 33-VI, 902).

A. All right. I said before he was a perfectionist or is. He writes well. He puts down the criteria that are required for good work. He is trying to establish when he writes that a figure for water. He is not trying to establish the relation between two different kinds of tap water.

Consequently, all that is required in this particular test that I performed is a comparison of the surface tension.

Q. Do I understand by that, Doctor, that you feel that this material that I read to you from Dr. Dorsey's book has some qualification that it is only to be used in certain water tests?

A. Oh, definitely. That could not—

Q. The tests that you were performing with the Evis Water Conditioner, in those you could be more or less slipshod and ignore these rather stringent requirements that he feels were necessary for testing surface tension of water. I might say, Doctor, that the chapter heading or the sub-heading of the chapter that I was reading from—I read the first three paragraphs of it—is "surface tension of water."

* * * *

A. I would say that I could ignore some of the factors, but I would not say that they were slipshod. (III, 1362-1363.)

Next, petitioners charge that Dr. Hoffman "recanted his original testimony" regarding the surface tension tests (Br. 35). Aside from the fact that Dr. Hoffman conducted other tests, he did not testify that the surface tension test alone would prove that Evis could have no effect upon water. It was one of the many tests performed by the scientists, all of which showed the ineffectiveness of Evis on water.

Further, petitioners quote Dr. Hoffman's testimony regarding an Evis installation at the Department of Agriculture station at Beltsville, Maryland (Br. 27-29). Counsel for petitioners was challenged during the proceedings to produce the persons who operated the installation there, but he never accepted the challenge and never produced the persons so that they would testify as to the alleged success of the Evis pipe at Beltsville (III, 1209). Moreover, there is no indication in the entire record that the installation under reference would have permitted a precise concurrent comparison with an installation without the Evis pipe operated under identical conditions at Beltsville. As Dr. Hoffman pointed out:

> A. I am a little reluctant to go into the installations in another department, if I can avoid it. It does not concern my tests any more than the mere inspection to see whether it was grounded.

And in response to an attempt by counsel for petitioners to introduce hearsay testimony regarding the Beltsville installation, Dr. Hoffman stated:

> A. If it is desired by the Commissioner or hearing examiner, I will answer it. I doubt whether I would regard that as my business. I thought it would be the business of the Department of Agriculture to make statements. I hesitate very much to go into another Department's installations and carry tales. * * * (III, 1204.)

As for the installation at the Old Dominion Building, Arlington, Virginia (Br. 29-30), Dr. Hoffman testified as follows:

* * * *

Q. In the course of your inspection at that building did you make inquiry of the operating personnel there as to what the conditions had been before and after the installation of the Evis unit?

A. I forget whether I made any inquiry. I was there mainly to see the grounding system that they were using. We climbed out a window on the roof. We looked at it. I would believe that the personnel was rather highly non-committal.

Q. I see.

A. More or less the idea, "There it is, look at it, see for yourself."

Q. Well, Doctor, had you either before or during that visit received any information that would indicate to you that prior to the installation of the Evis there had been a scaling problem?

* * * *

THE WITNESS: Well, I am very happy to answer that question, because I do not have to depend on hearsay. If you look at the coils there evidently was a scaling problem. Then looking at it again the scaling problem was not solved by the use of the Evis water conditioner. It was simply a case of half a dozen places some scale had broken off and had fallen to the bottom, so that what I saw there would be very inconclusive, no matter how I saw it or under what circumstances. (III, 1341, 1342.)

To all this is of course one basic answer: Petitioners did not put a single scientist on the stand to contradict Dr. Hoffman or to prove, on the strength of the Beltsville and Arlington operations, that Dr. Hoffman erred in his conclusions regarding the ineffectiveness of the Evis pipe.

Next, petitioners assail the testimony of Drs. Albrook and Adams of the Institute of Technology of Washing-

ton State College because of their alleged preconceived opinion of the Evis pipe (Br. 27). The fact is that all the other scientists who testified on behalf of the Commission confirmed their view. Furthermore, despite threats of litigation made by representatives of petitioners (II, 698) these scientists adhered to their opinions. And as for the participation of petitioners in those tests and experiments, Dr. Albrook most appropriately pointed out that the performance of this work was financed by the State of Washington and thus could properly be conducted only by state personnel to assure objectivity and absence of bias. (II, 734.) Moreover, since the Evis representatives were in the business of selling the device, their judgment certainly would have been colored by their own interests in any event (II, 735); but they were told that the college would be glad to set up tests for the petitioners (II, 737-738). At the same time, Evis representatives advised the college that tests were being arranged "with a laboratory of national recognition and reputation." (II, 739.) However, the record is absolutely silent as to whether these laboratory tests were ever conducted unless these representatives had reference to the Peninsula Laboratories' experiments which, according to the chemist Frantz, were inconclusive (p. 25 above).

As for the field experiments which were performed by the college, petitioners reject as implausible the explanation of the dissimilarity of scaling on the coffee urns equipped with the Evis pipe as compared to the scaling of urns without the device (Br. 40-41). Quite the contrary is true. Drs. Albrook and Adams testified that at least twice as much, if not three to four times as much, water ran through the coffee urns without the

Evis as through those with the Evis pipe, thus accounting for the differences in scaling (II, 596, 597, 770-771, 851, 880-881). And as to all of the tests conducted, Dr. Albrook clearly and unequivocally stated that the Evis would have no effect on water.

Petitioners also attack the validity of the beaker test and the base-exchange-softener test, which were performed under the supervision of civil and sanitary engineer Merrell (II, 2-3) of the Department of Water and Power of Los Angeles (p. 15 above) and which were designed to verify the claims that the Evis pipe "keeps drains and sumps free from scum" and "aids operation of base exchange softeners" (Br. 32-33). As to the first test, Merrell testified as follows:

* * * *

> Q. A man with your engineering experience and technical background in the water treatment field, and based upon that, you are prepared to testify that this test here is sufficiently related and comparable to the actual operation of drains and sumps as to be indicative of the effect of Evis?
>
> A. It can be, yes. Many sumps stand as a water trap on a water system, and they will contain water to keep a sewer line sealed. They may contain that for a long time. If not used they will stand and collect scum. To me, the placing of two beakers, one with conditioned water and one without, could be comparable to a sump that was standing and collecting scum. (II, 72.)

They criticize the base-exchange-softener test because the experiment took only three hours. Yet, petitioners have advertised that the results of the Evis will be apparent "immediately upon installation" (CX 18-VI, 853; CX 33-VI, 902). Indeed, two of petitioners'

consumer witnesses stated that they noticed the results of Evis action *immediately* upon use (III, 2047-2048; IV, 2256).

In general, to make their attack, petitioners simply take the position that, on the one hand, insofar as the chemical composition of water is concerned, the tests merely confirmed the inventor's assertion regarding such chemical composition and that, on the other hand, they were irrelevant (Br. 26, 31-33). It is quite obvious that petitioners necessarily had to reject laboratory testing as invalid because of the fatal weakness of their own scientific testimony. Yet no one can be so credulous as to believe that a scientific invention cannot be proved by scientific tests. The tests which petitioners criticize (Br. 31-32) constituted a logical starting point (II, 858-859). Above all, the large number and variety of tests and experiments carried out on behalf of the Commission, not solely in laboratories but also in field installations, produced, according to the scientists, only one result: the Evis pipe has no effect on water.

Finally, petitioners assail the tests performed by Drs. Johnson and Gildea of the Engineering Experiment Station of the University of Virginia (Br. 66-71). This attack is based upon alleged nonobservance of petitioners' instructions regarding accumulation of solids content and "blow-down" procedures. The instructions specifying the solids content were not included in the instructions available to Dr. Johnson and therefore not followed by him in the performance of the experiments (V, 3791-3792; CX 57-VI, 954-955; CX 58-VI, 956-959). Commission Exhibit 31B-VI, 897, which itemizes the contents of solids, was published *once,* i.e., in 1953. None of these specifications

was contained in any of the later instructions included in the record. Yet, petitioners have the audacity to claim that these tests were not carried out according to instructions regarding the content of solids even though such instructions were eliminated from later bulletins. So much for the instruction story.

Now, as for the "blow-down" tale, the record shows that Dr. Johnson flushed the stills he used in the test once a week (V, 3862). Moreover, at least three of the user witnesses who testified regarding the success of Evis stated that they did not clean their evaporator condensers after the installation of the Evis pipe (III, 1984; IV, 2569-2570, 2648). Furthermore, since there was no difference in the scaling between the Evis-equipped stills and those without the Evis pipe and both groups of stills were operated under identical conditions, the conclusion drawn by Dr. Johnson that the Evis device has no effect upon scaling was entirely justified (pp. 22-23 above).

Moreover, all conclusions are fully corroborated by the tests, opinions, and views of the other scientists who testified on behalf of the Commission. Indeed, petitioners' whole strategy of substituting scientific opinions and conclusions by criticism and attack exposes the fatal weakness of their entire position in this case. They abstained throughout the proceedings before the Commission from calling a single scientist who would state that the conclusions of the Commission witnesses regarding the ineffectiveness of Evis were wrong, and they thus completely failed to rebut the validity of these conclusions.

4. Petitioners have failed to rebut the Commission's scientific proof concerning the ineffectiveness of the Evis pipe.

We have demonstrated in the foregoing pages that under no known scientific principle or law could the Evis pipe have any effect on water, that the results of a large number of tests and field experiments have shown that the Evis pipe could not affect water, and that the scientific proof regarding the ineffectiveness of Evis is not controverted by any contrary scientific proof. In such a state of the record it is no defense for petitioners to contend that only practical experience, not scientific tests and experiments, will show the success of the Evis pipe (Br. 26). Such a defense is merely an attempt to insulate petitioners from the impact of adverse scientific proof. If there is any explanation of the alleged functioning of the Evis, it must be within the knowledge of petitioners but they admittedly and flagrantly failed to disclose any such knowledge (p. 6 above).

In the light of such circumstances the applicable principles of law are unmistakably clear. As pointed out by the Supreme Court in *Mammoth Oil Co.* v. *United States,* 275 U.S. 13, 51 (1927), quoting Lord Mansfield: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." And "* * * where a defendant has failed or refused to produce the most satisfactory evidence he leaves his cause exposed to the presumption that, if produced, it would tell against him * * *." *Armstrong* v. *Belding Bros & Co.,* 297 Fed. 728, 730 (2d Cir. 1924), *cert. denied,* 265 U.S. 585 (1924); see also *Mary Muffet, Inc.* v. *Federal*

Trade Commission, 194 F. 2d 504, 505 (2d Cir. 1952). Particularly appropriate here is the rationale of the court in *United States* v. *50¾ Dozen Bottles,* 54 F. Supp. 759, 762, 763 (W.D. Mo. 1944):

> The scientific testimony in a case of this character is the testimony that counts. Scientific testimony is available to support any meritorious cause * * *.
>
> * * * *
>
> There was a reason for the complete failure of the claimants to support their contentions by outstanding expert testimony. That testimony just was not procurable. The failure of the claimants in this respect impressed us as almost the equivalent of the confession of the general accuracy of the testimony of the Government's experts.

Consequently the failure and refusal of petitioners to disclose the metal composition of the Evis pipe and the claimed special processing, which are alleged to have an effect on water passing through the Evis pipe (p. 6 above) are in themselves strong confirmation of the Commission's conclusions. In *United States* v. *Denver & R.G.R.R.,* 191 U.S. 84, 92 (1903), the Supreme Court stated:

> * * * When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is

> manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative.

To the identical effect, see *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission, supra,* 143 F. 2d at 679.

Petitioners also assert that their user witnesses are the "true experts" in this case (Br. 71). Aside from the fact that none of the "true experts" explained in his testimony how and why this controversial piece of pipe performs the alleged function, hardly anyone would be so credulous as to regard a housewife, a stewardess, a cleaning shop owner, a hotel manager, a motion picture producer, a jeweler, a commercial photographer, a supermarket proprietor, a cafeteria manager—just to mention a few—sufficiently qualified to discuss the scientific problems which were the subject matter of inquiry.[23] Not only is their testimony of negligible value because changes in the water they used could have been caused by any number of factors (pp. 38-39 above), but it must be regarded as flatly contradicted by 3,000 other users, who could have been called to the stand. And it is also a well-established principle of law that "[o]pinions of experts when founded upon known scientific facts are not to be considered the same as opinions of laymen but are considered by the courts as substantial evidence." *Elliot Works* v. *Frisk,* 58 F. 2d 820, 824 (S.D. Iowa, 1932). The fact that the opinion of an expert is in conflict

---

[23] III, 2254; IV, 2825; IV, 2587; V, 3493; III, 2011; III, 2243, IV, 2361; IV, 2551; IV, 2621.

with the opinions of others who are not experts does not deprive it of its evidentiary substantiality. *Farley* v. *Heininger,* 105 F. 2d 79, 84 (D.C. Cir. 1939), *cert. denied,* 308 U.S. 587 (1939).

The long and short of all this is that petitioners' charges of error allegedly committed by the Commission (Br. 58-63) are refuted not only by the record but also by petitioners' inability to rebut the Commission's scientific proof, and their refusal to come forward with whatever knowledge they might have regarding a scientific reason for the functioning of the Evis fully substantiates the soundness of the Commission's conclusions.

Petitioners' final sally is directed against the Commission's reversal of the Examiner's ruling. In answer to this argument it suffices to call to the Court's attention the decision in *Federal Communications Commission* v. *Allentown Broadcasting Corp.,* 349 U.S. 358 (1955), which concerned the issuance, to one of two applicants, of a license to construct a broadcasting station. The examiner recommended that the application of Allentown Broadcasting Corporation be granted. The other applicant filed exceptions, and the commission reversed the examiner's finding and decided in favor of the other applicant. The appellate court reinstated the findings of the examiner because the commission was in error in overruling the examiner. The Supreme Court, in turn, reversed the appellate court and said in part:

> * * * Th[e] court analyzed the evidence before the Commission as to Easton's uncertainty on affiliating with radio networks to secure their programs for its listeners, the reluctance, evasive-

ness and lack of candor of Easton's principal witnesses, * * *. The court agreed with the Examiner and overruled the Commission. None of the above circumstances are in themselves a bar to the Commission's grant of license. Each involves appraisals of testimony that put into a record facts derived from various witnesses by interrogation. There was substantial evidence considering the whole record that had to be weighed, pro and con, as to types of programs, evasiveness of witnesses, * * *.

The Court of Appeals' conclusion of error as to evasiveness relies largely on its understanding that the Examiner's findings based on demeanor of a witness are not to be overruled by a Board without a "very substantial preponderance in the testimony as recorded," citing *Labor Board* v. *Universal Camera Corp.,* 190 F. 2d 429, 430. We think this attitude goes too far. It seems to adopt for examiners of administrative agencies the "clearly erroneous" rule of the Fed. Rules Civ. Proc., 52(a) applicable to courts. In *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474, 492, we said, as to the Labor Management Relations Act hearings:

> "Section 10(c) of the Labor Management Relations Act provides that 'If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact . . . .' 61 Stat. 147, 29 U.S.C. (Supp. III) § 160(c). The responsibility for decision thus placed on the Board is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are 'clearly erroneous.' Such a

> limitation would make so drastic a departure from prior administrative practice that explicitness would be required."
>
> That comment is here applicable. [349 U.S. at 363-364.]

The comment referred to by the Court is not only applicable in the *Allentown* case but also here. As pointed out by the Commission, the Examiner simply had misconceived the standard of proof required in a case of the instant nature (I, 814). After all, the Commission in its deliberations cannot substitute fiction for facts, and it must necessarily rely in its decisions upon known scientific facts, not upon unforeseen, purely speculative assertions that the unknown future might possibly supply an explanation for the reasons why the Evis pipe performs the alleged functions.

V. CONCLUSION

In the light of both the record in the instant case and the governing principles of law, the Commission's conclusions are eminently reasonable and the Commission's order to cease and desist has, in every respect,

been properly issued and entered. It should be affirmed and enforced.[24]

Respectfully submitted,

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Attorneys for the Federal Trade Commission.

Washington, D. C.,
April 1960.

[24] "To the extent that the order of the Commission is affirmed, the court shall shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Section 5 (c) of the Federal Trade Commission Act (52 Stat. 112 (1938), 15 U.S.C. 45(c) (1958)).

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APPENDIX

APPENDIX

List of Exhibits

(Pursuant to Rule 18.2(f))

Commission's Exhibit No.	Identified	Offered	Received as Evidence	Record Identification
2	II, 84	II, 85	II, 85	VI, 818-819
3A-B	II, 89	II, 90	II, 91	VI, 820-821
4	II, 138	II, 152	II, 152	VI, 823*
5A-B	II, 145	II, 148, 403	II, 404	VI, 824-825
7	II, 239	II, 240	II, 240	VI, 826
8A-F	II, 319	II, 320	II, 321	VI, 827-838
9A-B	II, 323	II, 324	II, 324	VI, 839-840
10	II, 324	II, 324	II, 325	VI, 841*
11A-B	II, 358	II, 359	II, 359	VI, 842-843
12	II, 403	II, 407-408	II, 408	VI, 844
13	II, 403	II, 411	II, 411	VI, 845
14	II, 403	II, 411	II, 411	VI, 846
15	"	"	"	VI, 847-848
16	"	"	"	VI, 849-850
17	"	"	"	VI, 851
18	"	"	"	VI, 852-855
19	"	"	"	VI, 856-858
20	"	"	"	VI, 859-860

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9A-B	II, 323	II, 324	II, 324	VI, 839-840
10	II, 324	II, 324	II, 325	VI, 841*
11A-B	II, 358	II, 359	II, 359	VI, 842-843
12	II, 403	II, 407-408	II, 408	VI, 844
13	II, 403	II, 411	II, 411	VI, 845
14	II, 403	II, 411	II, 411	VI, 846
15	"	"	"	VI, 847-848
16	"	"	"	VI, 849-850
17	"	"	"	VI, 851
18	"	"	"	VI, 852-855
19	"	"	"	VI, 856-858
20	"	"	"	VI, 859-860

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Commission's Exhibit No.	Identified	Offered	Received as Evidence	Record Identificatio
21	II, 403	II, 411	II, 411	VI, 861-864
22A-D	"	"	"	VI, 865-871
23	"	"	"	VI, 872-873
24	"	"	"	VI, 874
25	"	"	"	VI, 875
26	"	"	"	VI, 876-877
27A-D	"	"	"	VI, 878-885
28	"	"	"	VI, 886-889
29A-B	"	"	"	VI, 890-891
30	"	"	"	VI, 892-895
31A-E	"	"	"	VI, 896-900
33	"	"	"	VI, 901-904
34	II, 473	II, 473	II, 473	VI, 905
35	II, 560	II, 560	II, 560	VI, 906
36	II, 588	II, 589	II, 589	VI, 907-909
37	II, 601	II, 602	II, 602	VI, 910-912
38	II, 605	II, 605	II, 605-606	VI, 913-915
39	II, 607	II, 608	II, 611	VI, 916
40	II, 608	II, 613	II, 614	VI, 919
41	II, 608	II, 615	II, 615	VI, 922
42	II, 617	II, 622	II, 622	VI, 925
43	II, 625	II, 626	II, 626	VI, 928
44	II, 641	II, 642	II, 642	VI, 924*

*Record references identified with asterisks are to physical exhibits.

Commission's Exhibit No.	Identified	Offered	Received as Evidence	Record Identification
45	II, 705	II, 707	II, 707	VI, 930-931
46	II, 705	II, 707	II, 707	VI, 932-933
47A-B	II, 884	II, 886	II, 886	VI, 934-937
48	II, 925	II, 936	II, 936	VI, 938-940
49	II, 925	II, 936	II, 936	VI, 941-943
50	III, 987	III, 993	III, 993	VI, 944
51	III, 990-991	III, 993	III, 993	VI, 945*
52A-D	III, 991	III, 993	III, 993	VI, 946*
54	III, 1133	III, 1135	III, 1136	VI, 947-949
55	III, 1133	III, 1135	III, 1136	VI, 950-952
56	IV, 2663	IV, 2663	IV, 2633	VI, 953
57	V, 3791	V, 3791	V, 3791	VI, 954-955
58	V, 3792	V, 3792	V, 3792	VI, 956-959
61	V, 3815	V, 3816	V, 3816	VI, 962*
64	V, 3817	V, 3818, 3953, 3954	V, 3956	VI, 965-1008

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Petitioners' Exhibit No.	Identified	Offered	Received as Evidence	Record Identificati
34	III, 1192	III, 1729	III, 1730	VI, 1009-101
48A-E	IV, 2442	IV, 2445	IV, 2447	VI, 1013-101
49A-B	IV, 2691	IV, 2693	IV, 2693	VI, 1018*
50A-B	IV, 2877	IV, 2879	IV, 2879	VI, 1019*
51A-D	IV, 2937-2939	IV, 2950	IV, 2951	VI, 1020*
52	IV, 2978	IV, 2984	IV, 2984	VI, 1021-102
54A-D	IV, 3322	IV, 3324	IV, 3324	VI, 1025*
55	V, 3728	V, 3728	V, 3728	VI, 1026-106
56	V, 3728	V, 3728	V, 3728	VI, 1066-109
57	V, 3728	V, 3728	V, 3728	VI, 1100-112
58	V, 3728	V, 3728	V, 3728	VI, 1131-115
59	V, 3979	V, 3991	V, 3991	VI, 1162
60	V, 3979	V, 3991	V, 3991	VI, 1163

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No. 16,481

IN THE

United States Court of Appeals

For the Ninth Circuit

EVIS MANUFACTURING COMPANY, a corporation,
ARTHUR N. WELLS,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Most respectfully we submit that the Commission's brief, like the Commission's decision, establishes more effectively than anything else possibly could the lack of merit in the Commission's case.

In our opening brief we reviewed the evidence, both that submitted by petitioners and that presented by the Commission, and showed the total lack of support for the Commission's decision. The Commission's brief fails to discredit that showing in any way. For reasons which hereinafter we point out, it only emphasizes the prejudiced and capricious nature of its order.

Basically the Commission argues, (1) the mere "opinions" of the scientists that the Evis unit cannot benefi-

cially affect water, regardless of whether or not these scientists ever performed any tests (Resp. Br. 27-32), are substantial evidence that it does not beneficially affect water (Resp. Br. 11-14); (2) the tests performed by the scientists are substantial evidence that the Evis unit does not beneficially affect water (Resp. Br. 14-24); (3) the "conflicting consumer testimony" is not sufficient to overcome this "substantial" scientific testimony and, in any event, if there is conflict it is for the Commission and not for the court to weigh the evidence (Resp. Br. 24-32).

These contentions are untenable. There is no conflicting consumer testimony in this case (see pp. 11-15, infra). The evidence establishes as an indisputable physical fact that the Evis unit *does* beneficially affect water (Pet.Op.Br. 5-25). An expert opinion that a phenomenon which in fact occurs cannot occur is not substantial evidence. Similarly, testimony that a laboratory test on a few liters of water shows no change in molecular structure or in dielectric constant or in conductivity or in surface tension, etc., etc., is not substantial evidence that beneficial effects cannot occur in industrial and other practical installations when in fact beneficial effects in such installations *do* occur.[1]

---

[1]In addition, as Mr. O'Connell testified (R. IV, 2992):

"The concentrations of the material we are dealing with are so small, and in the case of treatment of surface waters so relatively variable that it is almost impossible to duplicate in a laboratory field conditions."

Also, as the court pointed out in *Navajo Freight Lines v. Mahaffy* (10 Cir. 1949) 174 F.2d 305, 310,

"The party offering evidence of out-of-court experiments must lay a proper foundation by showing a similarity of circumstances and conditions. * * *

'* * * Evidence of this kind should be received with caution * * *. In many instances, a slight change in the condi-

This court repeatedly has stated and applied the "well-settled rule"[2] that:

> "Opinion evidence in conflict with the physical facts * * * is not substantial evidence * * *.
>
> * * * * *
>
> Where physical facts contradict expert opinions, the facts must govern. Testimony of an expert can not prevail over such physical facts; and neither court nor jury is permitted to credit testimony so contradicted. * * *
>
> Evidence contradicted by the physical facts is entitled to no credence" (*State of Washington v. United States* (9 Cir. 1954) 214 F.2d 33, 43).

As this court said in *Deadrich v. United States* (9 Cir. 1935) 74 F.2d 619, a case involving a claim of total and permanent disability (p. 622):

> "How can it be said that he could not work, when in fact he did work?"

Under these decisions no substantial evidence in support of the Commission's position can be found in the fact that witness de Bussieres "stated that according to his knowledge of theoretical chemistry, there is not '* * * anything about the device that would cause a change in the charac-

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tions under which the experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful, rather than helpful.'"

[2] *Deadrich v. United States* (9 Cir. 1935) 74 F.2d 619, 622. And see:

Differential Steel Car Co. v. MacDonald (6 Cir. 1950) 180 F.2d 260, 268;

Galloway v. United States (9 Cir. 1942) 130 F.2d 467, 471;

United States v. Thornburgh (8 Cir. 1940) 111 F.2d 278, 280.

teristic of water passing through it' " (Resp.Br. 11); that Dr. Hoffman could not "visualize any '* * * scientific basis upon which [petitioners'] claims are based * * *' " (Resp.Br. 12); that witness Gildea "expressed the view that problems of water treatment are primarily of a chemical nature and that a device such as the Evis pipe could have no effect on water without changing '* * * the chemistry of it' " (Resp.Br. 13).

The Commission's whole attitude is summed up at page 50 of its brief:

> "Yet no one can be so credulous as to believe that a scientific invention cannot be proved by scientific tests."

This arbitrary position is not only rebutted by numerous occurrences within our common knowledge (see, e.g., Pet. Op.Br., 49 f.n. 47, and f.n. 3, infra) but is discredited by the testimony in this very record. To take but one example, the threshold treatment of water simply cannot be scientifically explained; indeed, it operates directly contrary to all known laws of chemistry. And this is established not only by petitioners' witness but by the Commission's own witness (Pet.Op.Br. 53-54). As Mr. O'Connell pointed out (Pet.Op.Br. 47-56), many treatments of water, including those involving the mere introduction of metal into the water system, have been greeted with skepticism and have been appraised as "scientifically impossible" under the knowledge of the day. Yet these treatments *worked* and, since the Commission did not enjoin their use, still work. Indeed, as we pointed out in our opening brief (p. 49), the amazing "sacrificial anode" now is used to protect metal from the corrosive effects of

water from the family water heater to the locks of the Panama Canal.[3]

The foregoing, we submit, answers the Commission's basic contentions. We wish also, however, to correct numerous inaccuracies and misrepresentations which appear in the Commission's brief. Some of these, as we shall point out, reflect such an incredible misunderstanding of the testimony as to give emphasis to the legal principle that accords due weight to the decision of the Hearing Examiner. In this case, as we have seen, he "lived" for

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[3]Recent achievements in the electronics field are now common knowledge, yet were considered impossible only a few years ago. A current article traces the development, by empirical methods, of processes to alter the crystalline structure of certain metals whereby they acquired new and wholly unknown characteristics, permitting their use as semiconductors or transistors:

> "* * * early in 1940 * * * a staff member working with silicon metal * * * demonstrated an unusual photoelectric cell made from pure silicon.
>
> Until that time, photocells had operated on the electrical effect produced by the interaction of the surfaces of two different metals exposed to light. Ohl's cell, by contrast, generated current in a single piece of metal—and the current was about ten times stronger than usual.
>
> * * * * *
>
> The point contact transistor was a partial answer to the need for a better switch. The device looked simple; it had no parts to wear or burn out, and it was incredibly small. * * *
>
> * * * Bell Labs' physicists didn't really understand why a point contact transistor worked. * * *
>
> * * * * *
>
> * * * The next advance required * * * research—into the properties of crystalline semiconductors * * *
>
> * * * * *
>
> * * * Shockley proposed a method of controlling current flow between areas of impurity elements in the crystal itself. These impurities would be introduced into the single crystal in amounts so tiny that ordinary chemical or metallurgical analysis couldn't detect them. * * *
>
> * * * * *
>
> In 1954 * * * a metallurgist, invented zone refining. This is a high-frequency heating technique that can melt a local-

nearly four years with the case, heard the witnesses and understood their testimony. We start with two outstanding instances of misrepresentation quite obviously due to lack of understanding:

A. The "'blow-down' tale" and the ion exchange test (Resp. Br. 51, 49).

In our opening brief we described Dr. Johnson's experiment "for the prevention and removal of scale" (Pet.Op. Br. 66-70). Purporting to answer our statement the Commission says (Resp.Br. 51):

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ized area of a long ingot of germanium—or other metal—and sweep the melted zone through the length of the ingot. The melted material is either a more or less effective solvent for impurities than the solid; so it sweeps the impurities in the metal to one end or the other of the crystal.

This technique was a boon: It not only purified the germanium, but it also concentrated the impurities in one end where more of them could be identified. It also provided a way to spread impurities evenly, under close controls, through the crystal.

* * * * *

In 1955, there were two principal techniques for producing this transistor sandwich.

The simplest—and still most common—method is to allow dots of impurity elements on opposite sides of a thin slice of germanium or silicon. * * *

The other way is to grow a junction in a single crystal. By adding impurities to the melt as the crystal is slowly withdrawn, impurity layers are placed across the diameter of the crystal. * * *

* * * * *

The next stride came in 1955, when Bell Labs came up with the diffusion method. It produced an impurity layer on wafers of single crystal germanium or silicon by heating the material in an atmosphere containing gaseous impurities. This diffused the impurities into the surface. Before it was possible to use this method, though, Bell's scientists had to identify—and control—other impurities that interfered with the material's talents as semiconductors when heated to diffusion temperatures. Those impurities were deadly in such small amounts that no method of analysis could detect them" (Business Week, March 26, 1960, pp. 86, 93, 96).

> "Now, as for the 'blow-down' tale, * * * at least three of the user witnesses who testified regarding the success of Evis stated that they did not clean their evaporator condensers after the installation of the Evis pipe (III, 1984; IV, 2569-2570, 2648)."

This statement is literally meaningless. The three "user witnesses" to whose testimony the Commission refers are Suchodolski (R. III, 1984), Buchanan (R. IV, 2569) and Morris (R. IV, 2648). Suchodolski testified concerning three evaporative (not evaporator) condensers which cool refrigerant gas by spraying cold water in the open air over pipes carrying the gas to condensers (R. IV, 2280), as contrasted with Dr. Johnson's stills in which water is boiled away. He testified that he no longer had to clean the tubes, vats and nozzles of the evaporative condensers, because, since the installation of the Evis unit, hard scale no longer formed (R. III, 1984-1985).

Buchanan testified concerning shell and tube type condensers where cold water flows through coils to cool refrigerant gas flowing through a shell or chamber on its way to the condenser (R. IV, 2280). He too testified that after installation of the Evis there was nothing to clean in the tubes and condensers because the scale which had previously caused so much trouble no longer formed (R. III, 2566-2571).

Morris, on the other hand, was a marine engineer who operated an evaporator in which water is boiled to produce steam to be condensed into boiler water. This operation *does* resemble Dr. Johnson's stills and the record is quite clear that Mr. Morris blew down his evaporator,

before the Evis was installed every three hours, after the Evis was installed every eight hours (R. IV, 2646):

> "We shut off the steam supply, secured the evaporator, filled the evaporator up with water, opened up the steam supply, raised the pressure inside the shell, opened up the skin valve, the blow down valve on the evaporator. The pressure blew the water out over the side, removing sludge and so forth."

With regard to cleaning, Morris stated:

> "Q After the installation of the Evis, was scale in the evaporator more easily removed than before?
>
> A As far as I was concerned there wasn't any scale to remove" (R. IV, 2647) "* * * Well, after installing the Evis it wasn't necessary to descale it at all" (R. IV, 2649).

Further, the Commission seeks to excuse Dr. Johnson's incredible experiments with water containing up to 1797.6 parts silica per million, when petitioners had specifically represented that the unit was not effective in the treatment of water containing more than 60 parts per million, (1) by characterizing this representation as an "instruction" which was not included in the instructions available to Dr. Johnson and therefore not followed by him (Resp.Br. 50), and (2) because the Evis bulletin containing the statement that the unit was not effective in water containing more than 60 parts per million of silica "was published *once* [Commission's italics], i.e., in 1953." The Commission goes on to say (Resp.Br. 51):

> "Yet, petitioners have the audacity to claim that these tests were not carried out according to instructions * * *."

This comment, again, can only be excused on the assumption of complete lack of understanding. The statement in the Evis bulletin was no part of any instruction. It was a representation as to the type of water in which the Evis is effective. Dr. Johnson was the Commission's expert witness and performed his tests under instructions supplied by the Commission (RX 59, R. VI, 1162, 2-11/6168-1, pp. 61-63). The bulletin containing the statement concerning silica was in the hands of the Commission on September 15, 1953, and was introduced in evidence in these proceedings on May 20, 1954, more than three years before Dr. Johnson's tests were performed. (See date stamps, CX 31, R. VI, 896.) The point is not that Dr. Johnson failed to follow an instruction. It is simply that, quite apart from the fact that his experiment could not possibly have any relevance as to whether the Evis unit prevented or removed scale in the proper operation of steam condensers, it was irrelevant because the water used had a silica content far in excess of the content which petitioners had specifically represented was the upper effective limit for Evis treatment.

Another example of a complete failure to understand the testimony is the Commission's comment with respect to Merrell's ion exchange test. The Commission says (Resp. Br. 49-50):

> "They criticize the base-exchange-softener test because the experiment took only three hours. Yet, petitioners have advertised that the results of the Evis will be apparent 'immediately upon installation' (CX 18-VI, 853; CX 33-VI, 902). Indeed, two of petitioners' consumer witnesses stated that they noticed the results of Evis action *immediately* upon use (III, 2047-2048; IV, 2256)."

In our opening brief we described the discovery and operation of the ion-exchange softener (pp. 55-56). The point of our criticism (Pet.Op.Br. 32-33), and that of the Hearing Examiner (R. I, 724, quoted at p. 33 of Pet.Op.Br.), is not that the Evis unit does not have an immediate effect upon water, but that a three-hour experiment in a laboratory, with 16 quarts of water and two ounces of ion-exchange material, has no relevance to actual operations in water systems where the normal cycle is two to four weeks. And this is particularly true, as noted by the Hearing Examiner (R. I, 724), because petitioner Wells' testimony was specific that the Evis unit will not improve the action of a clean base exchange water softener but does, throughout the life of normal operations, act to reduce the deposit of impurities upon the granules of the water softener, thus keeping more surface area exposed.

B. The Evis "pipe" (Resp.Br. 5).

In its opening statement of "The facts," the Commission says (pp. 5-6):

> "The Evis * * * is just a piece of pipe having the appearance of an oversized coupling with a vertical crosspost cast inside * * * made of cast iron or bronze * * * Petitioner Wells * * * testified that he had invented the piece of pipe called 'Evis' * * *."

Thereafter throughout its brief the Commission refers to the Evis water conditioner as a "piece of pipe."

These deprecatory statements have not heretofore appeared in any brief filed by counsel supporting the complaint. We simply point out that the Hearing Examiner held (R. I, 701):

> "It should here be observed that the Evis Water Conditioner has been shown to be composed, not merely of ordinary cast-iron, but in one case of a specially processed cast-iron containing unidentified elements and produced by a special process and in the other case of a specially processed bronze of which no qualitative analysis was made."

and that the Commission sustained this finding (R. I, 814):

> "In our opinion, counsel supporting the complaint has failed to prove that the Evis device is not made of a specially processed metal."

C. The purported conflict in the consumer testimony.

Characteristic again of the Commission's misrepresentation of the record are its repeated statements that the record contains "conflicting user testimony" (Resp.Br. 32) and that petitioners' entire case boils down to a statement by 91 users that "they were satisfied with the unit", whereas 3,000 other dissatisfied users would "flatly contradict" (Resp.Br. 54) or "offset" (Resp.Br. 10) the testimony of the 91. The Commission says:

> "Petitioners' entire rebuttal evidence consisted of what is generally known as consumer or user testimony, given by 91 witnesses. On the other hand, the record also demonstrates that 3,000 other users, had they been called to the stand, would have testified that Evis was a failure, so that the statements of petitioners' witnesses would have been more than offset (Resp.Br. 10).[4]

[4]For similar statements, see Resp. Br., 24, 25, 27, 31, 32, 54.

In our opening brief we answered a passage from the Commission's decision similar to the foregoing statements (pp. 78-80). That these statements should now be repeated in the Commission's brief is, to say the least, surprising.

The record in this case is quite clear that approximately 100,000 units were sold, of which approximately three percent failed to work for various reasons.[5] These reasons included the nature of the particular water, electrical disturbances (R. IV, 2922, 2926), defects in the piping system,[6] etc. The record is also quite clear that the exact representation made by Evis in this regard is (CX 31; R. VI, 900):

> "The current national average of EVIS installations is about 97% successful."

To aid in appraising the above-quoted representations of the Commission we add to the quotations in our opening brief (pp. 79-80) a few more excerpts from the record. In the argument and colloquy on the Commission's proposal

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[5]Tudury testified that of some 18,000 to 22,000 units he had sold and installed there were "way less than five per cent" which he was unable to make function properly (Tr. IV, 2916, 2921). Herwig testified to 15,000 units sold, with failures of less than 4 per cent (Tr. IV, 3145). Moran testified to 100 per cent success on ships, where you can't "find a better [electrical] ground than steel to salt water" (R. IV, 2469, 2989).

[6]"* * * for example, taking a simple installation, and the man would get Evis treated water over in this section of his house and he wouldn't get it over here. So they began tracing these lines back and they'd find a corroded union, perhaps one of these what we call a railroad union, which is half bronze and half galvanized iron and it might get a little corroded and galvanic action would set in and that galvanic action would kill the Evis action. So by taking a piece of wire and shunting around that union the action was—the galvanic action was killed and the Evis water would go right on through and come out at the tap, treated" (R. IV, 2924).

to reopen its case and to begin all over again,[7] counsel for petitioners pointed out (R. V, 3751-3752):

> "Our own witnesses which we called in our case, the respondents' witnesses have frankly conceded that it does not work in every case. The testimony of our distributors has shown that something in the order of 3 percent of the instances where the particular water, the type of installation, the particular electrolysis problem, the grounding problem is such that there has not been success.
>
> Taking that record, then as it now exists, a fair conclusion would be that there must be some 3,000 units throughout the United States that have not worked satisfactorily out of a hundred thousand.
>
> Now we have not disputed that fact in the record to date. We have come out and supported that conclusion with our own witnesses.
>
> We don't feel that that is critical to that case. We feel that a product of this type which has a 97 percent success average, with a hundred thousand units throughout the country, demonstrates the merit of the product.
>
> We feel that 3 percent is nothing more or less than what you would find for a national average on almost

---

[7]The Commission did not offer in rebuttal, as properly it could, to show that the installations which petitioners had proved to be successful were not in fact successful. It asked to start all over again on its case in chief and to introduce evidence concerning numerous other installations. This would not only have opened the door to proof by petitioners concerning the cause for failure of each such unit, such as improper installation, defective piping, nature of the water, etc., but also, if proper limits on rebuttal testimony were continued to be relaxed, to "rebuttal" testimony of successful use by 97,000 other users. For a quasi-judicial body to have permitted such a perversion of accepted trial procedures would have turned this administrative hearing into an instrument of oppression impossible for an ordinary citizen to combat (See Pet. Op. Br. 78-80).

any product. What does counsel supporting the complaint propose to do? Is he going to add anything to the record that is not already there?''

Counsel supporting the complaint in part responded (R. V, 3756):

> ''They said that the only real way to judge the effects of their product was in field or practical installations and they therefore produced, proceeded to introduce testimony that it is effective in field or practical operations as opposed to the lab tests which my witnesses had testified to.
>
> Therefore I feel that it is perfectly proper rebuttal to show that in field and practical tests, it does not *always* [italics added] work, and that this issue has been raised by the respondents on their defense.''

After further colloquy counsel for petitioners stated (R. V, 3760):

> ''We take the position that they are 97 per cent successful. By the same token we are willing to concede that there have been 3 percent unsuccessful.''

Thereafter the colloquy quoted in our opening brief occurred. The admission of counsel that 3,000 installations were unsuccessful was made with the express ''reservation'' that petitioners claim and could show 97,000 successful units (R. V, 3765):

> ''HEARING EXAMINER LIPSCOMB: One part of your statement is an admission, the other is a self-serving declaration and they would be so regarded.
>
> MR. MICHAEL: I don't quarrel with that. I am only making the admission *with that reservation* [italics added]. I am saying that that is what the

record shows. The record shows a hundred thousand sold and we only claim 97,000 units successful. We concede 3,000 that are unsuccessful. I am not going to quarrel and I don't think the decision in this case hinges on whether it is 3 percent or 5 percent or 10 percent or 15 percent.

HEARING EXAMINER LIPSCOMB: It doesn't."

Counsel for petitioners did not ask the Commission to accept or stipulate as to the 97,000 successful uses, but did make the concession as to unsuccessful uses with this express reservation. For the Commission now to attempt to torture this admission into a representation that the record shows 3,000 unsuccessful uses as against 91 successful uses, thus "offsetting" (Resp.Br. 10) and "overwhelming" (Resp.Br. 31) the testimony of petitioners' witnesses is, we submit, unjustified and inexcusable.

D. Drs. Albrook and Adams (Resp.Br. 48-49).

The Commission seeks to rehabilitate Drs. Albrook and Adams (Resp.Br. 48-49):

"* * * petitioners reject as implausible the explanation of the dissimilarity of scaling on the coffee urns equipped with the Evis pipe as compared to the scaling of urns without the device (Br. 40-41). Quite the contrary is true. Drs. Albrook and Adams testified that at least twice as much, if not three to four times as much, water ran through the coffee urns without the Evis as through those with the Evis pipe, thus accounting for the differences in scaling (II, 596, 597, 770-771, 851, 880-881."

This is but a part of the confused and unsatisfactory testimony these witnesses gave as to why in their test

the untreated coffee urn was so badly scaled (fig. 3, CX 39, R. VI, 916) as compared to the two urns supplied with Evis treated water (id., figs. 1 and 4). Dr. Albrook sought to explain the comparative freedom from scale of the Evis-treated urn in figure 4 by saying that it

> "* * * had not had sufficient [water] through it as yet [as compared to the untreated urn in figure 3] to be able to build enough scale on the coils [so] that it would crack off" (R. II, 597).

But at the same time the record showed that the Evis-treated urn in figure 1, with even less scale than that in figure 4, had used the same amount of water as Dr. Albrook complained of in the badly scaled untreated urn shown in figure 3.[8] Further, when Dr. Adams was questioned as to why the Evis-treated water in the urn in figure 4 was softer than untreated water, his explanation completely discredited Dr. Albrook's explanation (R. II, 881-882):

> "Q. I understand you. In other words, since they don't run as much water through it, and don't draw off as much coffee as the other urns, the non-Evis urn, you have a volume of water sitting in the urn for a longer period of time?
>
> A. That is correct.
>
> Q. With the coils heated?
>
> A. That is correct.
>
> Q. And under those circumstances, you would normally expect to find a greater precipitation of the

[8]Dr. Albrook testified that 775 cubic feet of water was used in the urn in figure 3 and that 35 gallons of water per day was used in the urn in figure 1 (for 5½ months) (R. II, 763, 770). Thirty-five gallons is 4.7 cubic feet; 5½ 30-day months is 165 days; 165 times 4.7 cubic feet equals 776 cubic feet.

calcium and magnesium from the water, is that correct?

A. That is correct.

Q. And that explains why the water in that urn, after it passes through the urn, had a lower hardness than the water that went through the non-Evis urn?

A. That is exactly correct."

In short, according to Dr. Adams' explanation, far more scale should have been found on the walls of the Evis equipped urn because of the greater precipitation of calcium and magnesium from the water; yet, as the photograph shows, that urn was cleaner than the non-Evis urn.

To lay at rest once and for all the testimony of these two witnesses, we quote the Hearing Examiner who observed and heard them (R. I, 718-719):

"Both Dr. Albrook and Dr. Adams undertook the tests here in evidence with the preconception that the Evis Water Conditioner was worthless. Furthermore, at a conference held in August, 1952, which was attended by a representative of the Respondents herein, and by Dr. Adams and Dr. Pearl, Director of the Institute of Technology at Washington State College, a question arose as to Dr. Adams' personal bias in the matter of conducting tests with the Evis Water Conditioner. At that time Dr. Pearl stated that Dr. Adams would be relieved from any further investigation of that device. Despite this statement, Dr. Adams did subsequently participate in the various tests, the results of which are now under consideration.

* * *

The testimony of these witnesses regarding their prejudgment of the value of the Evis Water Conditioner is so evasive that we are constrained to con-

clude that such a preconception did exist in the minds of both Dr. Albrook and Dr. Adams. * * *

In support of their tests, several photographs purporting to show the effect of the Evis Water Conditioner on hot water tanks and coffee urns were presented. The contrasting pictures in these exhibits tend to indicate that less scale had been deposited on the appliance in which Evis-treated water was used. Both witnesses offered several reasons, other than the effect of the water, why there was less scale in the appliances using Evis-treated water and more in the others. The overall impression received from the testimony of these witnesses as a whole, however, is that the factual content thereof is too much intermingled and clouded with evasions, qualifications and attempted explanations to constitute reliable, substantial and probative evidence that the Evis Water Conditioner will not prevent or remove scale in a water system.''

E. Dr. Weast's tests (Resp.Br. 44).

At page 44 of its brief the Commission characterizes as ''ridiculous and frivolous'' our statement that petitioners have never claimed that the Evis unit will ''remove the Cleveland type of scale'' (referring to pages 39-40 of our brief). This is not what we said. We said that petitioners have not represented that the Evis unit will remove ''encrustations resulting from the corrosion of metals'' (Pet.Op.Br. 39-40). Our statement is correct. The Commission characterizes it as ''ridiculous and frivolous'' because the Evis bulletins represented that the unit ''combats or eliminates corrosion'' (Resp.Br. 44). Reference to the bulletins cited by respondent (Resp.Br. 44) will show that the Evis representation is not that the unit will re-

move the encrustations of old corrosion, but that it will prevent corrosion by releasing from the water entrained gases which cause the pitting of metal.[9] We submit that if a manufacturer represents that a product will *prevent* corrosion by releasing entrained gases which cause the pitting of metals, and it is charged that this representation is false, it is not "ridiculous and frivolous" to assert that it is irrelevant to attempt to show that the product will not *remove* heavy encrustations resulting from seven years of corrosion (R. III, 986, 1069).

F. Dr. Hoffman (Resp.Br. 12-13).

The Commission seeks to discredit Wells' testimony concerning catalytic effect by relying on Dr. Hoffman's statement "that Wells' claim of the catalytic effect's changing 'something physical' was scientifically untenable (III, 1118). * * * a catalyst cannot cause a reaction to occur; it can merely accelerate an existing reaction * * *" (Resp.Br. 13).

The following is from Dr. Hoffman's cross-examination (R. III, 1330-1333):

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[9]One of many examples in the record is the case of the Dallas City Packing Company, a large meat packing plant in Dallas, Texas (R. V, 3612-3613), which had experienced a severe pitting problem in its pipes, boilers, cookers and ice-making machinery due to the high carbon dioxide content in the water from the company's well (R. V, 3613-3617). "Little clinkers would form on the inside of the pipes and when these would slough off, it would leave a pit in the metal, and eventually would come on through the outside and cause leaks" (R. V, 3614). Mr. Waldman, a graduate engineer and a partner in the firm, testified that the Evis unit "has reduced our corrosion problem to what I would call a minimum" (R. V, 3619). He stated that in the past it had been necessary to replace steam lines and valves every three to six months; after the installation the lines remained in service a year and a half to two years (R. V, 3620).

"Q * * * There is, is there not, Doctor, a body of scientific opinion which holds to the belief that a catalyst can initiate a reaction as distinguished from merely affecting the rate of the reaction?

A I presume that is true. I am not familiar with it.

* * * * *

Q I will read the statement to you again, Doctor. It is as follows:

'The ability of a catalyst to initiate a chemical reaction is as yet unsettled in the minds of most authorities.'

I will ask you, Doctor, whether you agree or disagree with that statement.

A I can't answer it.

* * * * *

A * * * Understand, I am not an expert in catalysis. It is a terrifically big field."

Again, in connection with Dr. Hoffman's admission that his test for surface tension should be "summarily discarded as valueless" because it did not comply with Dr. Dorsey's requirements, the Commission says that petitioners attributed to Dr. Hoffman a statement he never made (Resp.Br. 44). The record is as follows (R. III, 1359-1362):

After Dr. Dorsey was identified as a former member of the Bureau of Standards, the following was read from Dr. Dorsey's book:

"Q '* * * Each determination must be studied individually and in every detail, including the derivations of the formula and their applicability to the experimental conditions actually realized. This involves great labor. In general every determination

based upon observations and computations that have been published without sufficient detail to enable one to make such a critical study should be summarily discarded as valueless.'

Do you agree with that?

A That is all right.

* * * * *

Q * * * In your opinion does your record of the tension tests that you conducted on Evis meet the requirements or meet the standards of Dr. Dorsey as expressed in this book of his that was written while he was a member of the National Bureau of Standards?

A It does not meet those standards.''

Dr. Hoffman then sought to qualify his answer by stating that he could ignore some of the factors specified by Dr. Dorsey. Cross-examination then took him through numerous requirements specified in Dr. Dorsey's book, and in each case Dr. Hoffman said that he either had not complied with the requirement or had made no record (R. III, 1363-1369). In each case he stated that he agreed with Dr. Dorsey.

Dr. Hoffman's admission that in any event the surface tension test was not a conclusive test as to ''the effect of Evis'' on water (R. III, 1369) is quoted in our opening brief (pp. 34-35).

Finally the Commission quotes Dr. Hoffman's volunteered statement concerning the Evis unit installed in the Government's Old Dominion Building at Arlington: ''* * * the scaling problem was not solved by the use of the Evis water conditioner. It was simply a case of half a dozen places some scale had broken off and had

fallen to the bottom, so that what I saw there would be very inconclusive, no matter how I saw it or under what circumstances'' (Resp.Br. 47).

It was immediately following this statement that the following occurred (R. III, 1342-1343):

> ''Q I see. The fact that the unit was de-scaling there and you saw evidence of that in your opinion carried no weight one way or the other, Doctor, is that it?
>
> A I have to base that—I hope you understand—on the fact that I did not see another one close by under the same circumstances which did not have an Evis conditioner on it.
>
> Q All right.
>
> A I must hold to that.''

Dr. Hoffman *did* see two evaporative condensers ''close by under the same circumstances'' at the Department of Agriculture Station at Beltsville, Maryland, one equipped and the other not equipped with an Evis conditioner. He ''observed * * * that the Evis unit was clean as compared with the non-Evis unit which was scaled.'' He overheard ''personnel at the station [say] that in the case of the Evis unit they had at that time been able to operate it for eight weeks without cleaning as distinguished from their prior practice of cleaning it every 10 days to 2 weeks'' (Pet.Op.Br. 28-29). He disregarded these two installations ''close by under the same circumstances'' because he was ''a little reluctant to go into the installations in another department, * * *'' (Resp.Br. 46).

G. Petitioners' witnesses O'Connell and Frantz (Resp.Br. 10, 25-26, 39-40).

The Commission criticizes petitioners because their expert witness O'Connell was not asked to express an opinion as to the scientific laws "which explain the functioning of the Evis pipe, and above all whether the Evis pipe has any effect on water" (Resp.Br. 40). Instead, it says, he "observed sepulchral silence in this respect" (Resp. Br. 40, 26).

Mr. O'Connell has "never done any work of any nature for the Evis Company" and was retained by counsel for petitioners to aid them in the trial of this case (R. IV, 3044). He was called as an outstanding expert in the field of water treatment to comment on the Commission's so-called tests and to give, for a better understanding of the issues, expert testimony in the broad field of water treatment. His testimony is summarized in part at pages 47-56 of our opening brief. It is impressive and helpful.

The Commission knows that petitioners made no attempt to show *why* the Evis unit works. The inventor himself does not know. He knows that it works. He knows that the results occur because of the special processing of the metal. He knows how to process the metal to get those results, a process discovered through experimentation, and he has applied for a patent on that process.

The Commission's position, that actual performance must be discredited if it cannot be explained, is without support in the law. In the leading case of *Diamond Rubber Co. v. Consol. Tire Co.* (1911) 220 U.S. 428, the Supreme Court held (pp. 435-436):

> "A patentee may be baldly empirical, seeing nothing beyond his experiments and the result; yet if he has added a new and valuable article to the world's utilities he is entitled to the rank and protection of an inventor. And how can it take from his merit that he may not know all of the forces which he has brought into operation? It is certainly not necessary that he understand or be able to state the scientific principles underlying his invention, and it is immaterial whether he can stand a successful examination as to the speculative ideas involved."

Similarly, in *DeForest Radio Co. v. Gen. Elec. Co.* (1931) 283 U.S. 664, 686, the Supreme Court said:

> "Whether [the inventor] knew the scientific explanation of it is unimportant, since he did know and use the device and employ the methods, which produced the desired results."

Turning to petitioners' witness Frantz, the Commission says that the testimony of the Commission's experts "was corroborated by that of the only scientist, a chemist, who was called as a witness on behalf of petitioners and who stated on the stand that tests to substantiate the validity of the Evis claims had proved to be inconclusive" (Resp. Br. 10, and see 25, 26, 39).

Again, let the record speak. Mr. Frantz's statements, quoted out of context by the Commission (Resp.Br. 25), are: "Frankly, I haven't seen enough evidence to state as a scientist that I have seen there is proof that the Evis unit does do it * * * (IV, 2803)", and "As a scientist, I can't say for sure." These statements, we submit, only make more impressive the testimony of this scientist who,

after conducting carefully controlled tests with the Evis unit which consistently showed beneficial results, testified (R. IV, 2806, 2803):

> "* * * I think there's been about eight experiments that we did with varying compositions and found this consistent result. I am not prepared to say my mind is made up that the Evis was the cause of it. I made these tests, I found these results, and they do indicate that possibility."

> "I don't care to express a firm opinion. I do wish to state very definitely that I have seen certain evidence that there is an Evis effect and I haven't been able to explain the observed data in any other way."

H. Petitioners' instructions (Resp.Br. 32-39).

Once again the Commission seeks to meet the criticism of the Hearing Examiner (Pet.Op.Br. 45) for the failure of its experts to follow petitioners' instructions (Pet.Op. Br. 45). Again the Commission reviews the instructions issued by petitioners, and complains of differences in them. It points out that petitioners' last instruction, issued near the close of these proceedings, eliminated entirely any description of grounding procedures (Resp.Br. 32-36).[10]

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[10]This point can be quickly disposed of. Prominent on the face of this last bulletin, printed with the Evis guarantee, is the statement (CX 57; R. VI, 954):

> "After installation service—inspection must be made by the same dealer issuing the Guarantee Certificate."

The testimony in this case is abundantly clear that the service representatives of Evis, in inspecting the installations, made certain before final approval that they were properly installed. In this regard particular attention was paid to grounding (see, for example, R. IV, 2928).

Further, says the Commission, its experts should not be held to a strict compliance with petitioners' instructions because many installations of petitioners' own witnesses were not made pursuant to the instructions (Resp.Br. 36). Finally, the Commission says, those of its experts who performed their tests before certain instructions were issued cannot be criticized for not following those instructions.

Our opening brief points out that numerous installations from the outset worked without grounding; that changes in the instructions were made from time to time as field experience disclosed that electrical currents were causing certain failures and as other experiences dictated change (Pet.Op.Br. 42-44, 74-78). The trial of this case commenced in 1954. All the instructions necessary for the proper installation and operation of petitioners' product had been issued and were in the Commission's hands long prior to the trial and even long prior to the filing of the complaint (CX 8, 27; R. VI, 832, 885; RX 34; R. VI, 1010). With full knowledge of these instructions the Commission sought to rely upon the opinions of so-called experts based upon outdated experiments performed in accordance with outdated instructions. Of course, as the Commission says, "Scientists could not possibly have known about [the instructions] before the date of [their] publication" (Resp. Br. 39). But this misses the point entirely. When the Commission offered the opinions based upon these experiments it knew that the experiments had been performed upon defective installations. And this is the more inexcusable, because the instructions which had been issued prior to trial had been published after practical experi-

ence had demonstrated that installations which failed to comply with them could be ineffective. As the Hearing Examiner held (R. I, 710):

> "It seems essential, however, that if a device is to be tested, the manufacturer's directions for the use thereof should be faithfully followed. It seems both unfair to the manufacturer and logically unsound to expect reliable results from an experiment conducted in disregard of the manufacturer's instructions for the proper use of the product being tested."

I. The Commission's suggestion that the discontinuance of chemicals or changes in water supply "could have caused" the benefits which resulted from the installation of the Evis units.

At pages 38-39 of its brief the Commission says, "With regard to most user installations the consumers' testimony was confined to 'before and after' results, thus making a concurrent comparison between Evis-treated and non-treated water impossible." In these circumstances, the Commission speculates, "any one of a number of factors unrelated to the Evis pipe *could* have caused" the beneficial changes the witnesses experienced. For example, the Commission says, "in many cases numerous witnesses discontinued the use of * * * chemicals" and, therefore, "it is a matter of pure speculation whether the Evis pipe or the discontinuance of * * * chemicals caused a change in conditions." Further, says the Commission, some witnesses "testified about changes in the water supply" and "Others did not know whether there was a change in the water supply." These factors, says the Commission, "may well have contributed to a change in the water regardless of the installation of the Evis pipe."

It is true, of course, that most of petitioners' witnesses described conditions existing before and after the installation of Evis units. This necessarily was so where the unit serviced the only equipment or the whole plant. At the same time, the Commission fails to point out that the record contains the strongest kind of evidence of carefully controlled parallel tests made by experienced engineers on identical equipment. In each case these tests exhibited marked differences and showed exceptional performance by the Evis. In the Appendix to this brief we summarize the testimony concerning parallel tests conducted in the Post Office and Court House Building in Fresno (where hearings in this case were held), in the Fresno plant of the Central Valley Ice Company, in the Fresno Bee Building, in the G. W. Hume Company cannery at Turlock, and in the Bridgford Packing Company plant at Anaheim.

Beyond this, the Commission's speculations are directly contrary to the record. As to chemicals, witness after witness testified that one of the very benefits flowing from the installation of Evis units was the fact that expensive chemical treatment could be discontinued. Elsewhere in its brief the Commission takes the position that chemical treatment of water is the only treatment that can be effective. Here it seems to contend that the beneficial results which flowed from the Evis conditions should be attributed to the *discontinuance* of chemical treatment.[11]

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[11]The argument, of course, is absurd. In support of it the Commission, in footnote 19 on page 38 of its brief, gives record citations to the testimony of a number of witnesses. Typical is that of

The Commission's other speculations about "changes in the water supply" of certain witnesses and about the lack of knowledge by other witnesses as to whether there had been any "change in the water supply" (Resp.Br. 38) are equally without merit. They rest on random cross-examination never connected up in any way with the "before and

---

Witness Rogers, Plant Foreman of the Nehi Bottling Company plant at Orange, California (R. III, 2132, 2133-2134):

"Q And with this chemical water softener in operation, did you have any scaling problems in the equipment, the soaker, or any of the washing or bottling equipment?

A Yes, we did with the water softener. We had scale. Scale built up every once in a while. We would have to—well, I would say probably once a week, we would have to take out the jets and clean them off because they would become stopped up from scale.

* * * * *

Q Now, you say that you installed the Evis approximately three-and-a-half years ago?

A Yes.

Q Since that time, what, if any, changes have you noted in the condition of the scale on the equipment?

A The scale has, well, our machine today has no build-up at all on the chain itself. There is still some in the corners, of the previous scale, but it is soft. It has become soft, so it is easy to remove.

Q I see. Have you continued to use the chemical water softener since the installation of the Evis?

A No, I have taken out the water softener altogether. We just use the Evis.

Q While the water softener was being used, before the installation of the Evis, did you find or experience any problems with the change in the cycle of the softener?

A Well, yes, you had to watch it quite closely because if you run out, then your scale build-up was as bad as when you first started. The alkalinity in the Orange water is approximately 183 parts per million which is pretty high.

Q And since the installation of the Evis and the elimination of the water softener, have you also been able to eliminate that problem?

A Yes, I have. I don't have to watch it at all now. All I have to do is turn the water on and just go to work."

after'' results,[12] or on descriptions of water having nothing to do with the validity of those results.[13]

It is solely upon the basis of these completely untenable speculations that the Commission asserts (Resp.Br. 30):

> ''Small wonder, in the light of such a state of the record, that the Commission could attach little value to the user testimony.''

---

[12]For example, as to "changes in the water supply," the Commission cites the witness Perata, who testified (R. IV, 2384):

> "Q Do you know where the Oakland city water comes from?
>
> A Well, we have various reservoirs over there. We have them in San Leandro, we have them in the Berkeley Hills and we have them in Contra Costa County and in various locations.
>
> Q And they draw from different reservoirs at different times, do they not?
>
> A That's right.
>
> MR. DOWNS: I believe that is all."

As to lack of knowledge of "change in the water supply," the Commission cites the witness Manney, who testified (R. IV, 2695-2696):

> "Q Do you know what the source of the water is that you used to make this test.
>
> A Yes. It's Vallejo city water. We buy our water from the City of Vallejo.
>
> Q Do you know whether or not that is well water or reservoir water or lake water?
>
> A I think it's reservoir. I'm not sure.
>
> Q Do you know whether or not the city puts it through any sort of treatment?
>
> A No. I couldn't answer that because our—I know that our source is two 21 inch lines that run from the City of Vallejo."

[13]For example, the Commission cites the witness Bowen, President of S. R. Bowen Company, manufacturers of oil well equipment in Santa Fe Springs, California. This witness testified (R. III, 2061):

> "Q Now, at the present time, is your water supplied to you by the city water system in Santa Fe?
>
> A It is.
>
> Q Has that been a recent change in the supply?
>
> A Very recent.
>
> Q Within the last several months?
>
> A Yes.
>
> Q Prior to that, what was the supply of your water?

CONCLUSION

We submit that the order of the Commission is unwise, unjust and unsupported by substantial evidence. We repeat the words of the Hearing Examiner in his Second Initial Decision (R. I, 731-732):

> "* * * we may be here confronted with the first practical application of a device operating upon a principle heretofore unrecognized by present-day science. In the presence of such a possibility, justice to the Respondents as well as to the public interest requires that we approach with caution the issuance of a cease-and-desist order which might well mean the economic destruction of the Respondents and the consequent loss of their device."

And we refer again to the words with which the Hearing Examiner closed his First Initial Decision (R. I, 547):

> "It is the purpose of the Federal Trade Commission, and of Congress in enacting its empowering statutes, to remove hindrances and obstructions in the course of commerce, and to direct and facilitate its flow—never to set up roadblocks in its way. We cannot, in this instance, justify the issuance of an order

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A Our own well on the property.

Q And can you tell us whether that, directing your attention to the well water, can you tell us whether that was a hard water or soft water or what?

A It was extremely hard water that we could not drink.

Q It was used, however, in the water piping system throughout the plant?

A It was."

But the Evis conditioner concerning which Mr. Bowen testified had been in operation more than two years (R. III, 2062), and his testimony related entirely to experience with the hard well water. The "recent change" had nothing to do with "before and after" performance.

which might act as a brake on the wheels of progress."[14]

We respectfully submit that the order of the Commission should be set aside.

Dated: San Francisco, California,
June 30, 1960.

Respectfully submitted,

FRANCIS R. KIRKHAM,
JAMES MICHAEL,
HARRY C. SCOTT,
PILLSBURY, MADISON & SUTRO,
Attorneys for Petitioners.

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[14]Compare *De Forest's Training v. Federal Trade Commission* (7 Cir. 1943) 134 F.2d 819, where in 1943 the court affirmed a cease and desist order issued by the Commission against a school for television mechanics, saying (p. 821):

"No one can say with certainty when the commercial development of television will reach a stage which assures opportunities for employment of large numbers of men."

(Appendix Follows.)

Appendix.

Appendix

INSTANCES OF PARALLEL TESTS OF THE EVIS UNIT.

1. The Post Office and Court House Building, Fresno, California.

This building is equipped with three independent and identical air-conditioning systems, each of which contains two air washers used as cooling towers together with its own bank of extended surface cooling coils. Raymond A. Crosby, superintending engineer for the United States Post Office Department, testified that since the opening of the building in 1940 he had always been faced with a critical problem caused by the formation of flint-like scale in the closed copper tubing of the extended surface cooling coils (R. IV, 2328). After each season, considerable expense and many man-hours were required to remove the scale by separately drilling each copper tube. Mr. Crosby installed an Evis unit on one of the three systems. At the end of the next season he examined all three systems and discovered that the tubing in the system equipped with Evis contained only a soft fluffy material which could easily be washed out, whereas the other two systems had continued to scale as they had in the past (R. IV, 2331-2332, 2338, 2683).

Subsequently, additional Evis units were purchased and installed for the other two air-conditioning systems and at the end of the following season Mr. Crosby found that these two systems had been benefited in the same way as had the first. This test was performed under the supervision of Carl L. Shepard, Chief of the Construction and Supervision Branch of the General Services Administration of the United States (R. IV, 2680-2683), part of whose testimony is quoted in petitioners' opening brief, pages

10-11. Mr. Shepard also testified to successful results with at least seven additional Evis units in installations on other Government buildings (R. IV, 2680-2686).

2. Central Valley Ice Company plant, Fresno, California.

Central Valley Ice Company operates 14 plants in the San Joaquin Valley, California. At its Fresno plant it operates three evaporative condensers, two identical ones of 60-ton capacity and one of 75-ton capacity. Prior to the installation of Evis the 75-ton unit had been regularly treated with chemicals (R. IV, 2276). No treatment had been given the two 60-ton units and they had become so badly scaled that the head pressure had increased to 180 pounds as compared with a normal pressure of 120 to 125 pounds (R. IV, 2270). For every 10 pounds of increase in head pressure, electric power consumption increased 2 per cent. Fernon C. Wickstrom, refrigerating engineer for the company, testified that at a cost of approximately $800 he had the two 60-ton units cleaned with acid, which was successful in removing only approximately 75 per cent of the scale (R. IV, 2274). He then installed an Evis unit on one of the 60-ton units for a trial period; the other two units he treated with chemicals. After careful observation throughout the following year he found that the Evis-equipped condenser provided the same results as were accomplished on the other two with chemical treatment. Evis units were then installed on the other two condensers and chemical treatment discontinued, after which the Evis units removed about half of the old scale remaining after the $800 descaling (R. IV, 2278). At the time of the hearing Mr. Wickstrom testified that all three condensers had remained clean and in excellent operating condition.

3. **Fresno Bee Building, Fresno, California.**

Arthur M. Lucas, Building Superintendent of the Fresno Bee Building, installed an Evis on a 40-ton evaporative condenser with which he had experienced a serious scaling problem and which was heavily scaled at the time of installation. Paralleling this unit he had a new 65-ton condenser which he operated without an Evis. At the end of the season the 40-ton condenser equipped with Evis had descaled, while the new 65-ton condenser had accumulated a hard scale (R. IV, 2313-2314). Thereupon, the installation of the Evis was changed so that it would serve both condensers, after which the scale disappeared from the 65-ton condenser and both units remained clean, eliminating the need for constant cleaning and descaling which had formerly been necessary (R. IV, 2315).

4. **G. W. Hume Company plant, Turlock, California.**

The G. W. Hume Company cannery uses four large boilers in its operation. Arthur A. Gallardo, superintendent of the plant, testified to a long history of severe scaling in all four boilers despite the use of boiler compounds at a cost of approximately $1500 per year (R. III, 2165-2167). An Evis unit was installed on one of the four boilers on a trial basis and operated for an entire canning season. At the end of the season there had been no scale formation in the Evis-equipped boiler and a substantial amount of the old scale had come loose. Scaling continued in the other three boilers. Three additional Evis units were purchased and installed on the remaining boilers after which there was no build-up of scale in any of the boilers (R. III, 2166).

5. **Bridgford Packing Company, Anaheim, California.**

Lawrence L. Sligh, Chief Engineer for the Bridgford Packing Company, testified to the operation of two 100-horsepower boilers. He had experienced a severe problem with heavy build-up of rock-like scale, although attempting to control the scale with boiler compounds at a cost of between $600 and $800 per year (R. III, 1896-1898). When the company bought an Evis unit, Mr. Sligh installed it on the make-up line to one boiler only and thereafter operated one equipped with an Evis and the other not equipped (R. III, 1896-1898). After finding that the Evis-equipped boiler was descaling while the other continued to build up scale, he changed the installation so that the Evis would serve both boilers. Old scale was eliminated in both and no new scale formed, and Mr. Sligh found that he could reduce the water pressure from 100 pounds to 60 pounds to satisfy his requirements (R. III, 1895-1896), and that operating temperatures could satisfactorily be reduced from 1600-1800°F to 800-1200°F at substantial savings in fuel costs (R. III, 1897-1901, 1910). He used boiler compounds for a while as a precautionary measure, but found that their use was not required. "When the supply of chemical compound ran out, why, I didn't buy any more. Q. And since that time you have been able to operate the boilers without any compound? A. That's right" (R. III, 1896).

No. 16493

United States
Court of Appeals
for the Ninth Circuit

WESTERN MOTOR SERVICE CORPORATION,

Appellant,

vs.

LAND DEVELOPMENT AND INVESTMENT COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Arizona

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—9-11-59

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

ATTORNEYS OF RECORD

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In the United States District Court
For the District of Arizona

No. Civ. 2830 Phx.

LAND DEVELOPMENT AND INVESTMENT COMPANY, a California Corporation,

Plaintiff,

vs.

WESTERN MOTOR SERVICE CORPORATION, a Nevada Corporation,

Defendant.

PETITION FOR REMOVAL OF CIVIL ACTION

To: The Honorable The United States District Court, for the District of Arizona:

The petition of defendant, a corporation, hereinafter called "petitioner," respectfully shows:

I.

That this is a civil action brought by Land Development and Investment Co., as plaintiff, to recover from petitioner, as defendant, the sum of Five Thousand Thirty-four 91/100 Dollars ($5034.91) alleged to be due under a lease agreement between plaintiff and petitioner, all as more particularly appears from the true copy of plaintiff's Complaint filed herewith.

II.

That the amount in controversy at the time of commencement of this action exceeded and now

exceeds the sum of Three Thousand Dollars ($3000.00), exclusive of interest and costs.

III.

That plaintiff was at the time of commencement of this action, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California, and a citizen and resident thereof, and petitioner was at the time of commencement of this action, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, and a citizen and resident thereof.

IV.

That the action was commenced by the filing of plaintiff's Complaint in the Superior Court of the State of Arizona, in and for the County of Maricopa, Docket No. 97820, on the 17th day of February, 1958, all as more particularly appears from the true copy of the Summons filed herewith. Said Summons was served upon petitioner on the 17th day of February, 1958. This petition is filed within twenty (20) days after service of process. Petitioner has not moved, answered, pleaded or otherwise appeared in said Superior Court of Arizona.

V.

That, by reason of the foregoing, this is a civil action of which the district courts of the United States are given original jurisdiction and is removable to this court.

VI.

That petitioner presents herewith a cashier's check, conditioned that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

VII.

That upon the filing of this petition and check aforesaid, petitioner is giving written notice thereof to all adverse parties and is filing a copy of this petition with the Clerk of the Superior Court of the State of Arizona, in and for the County of Maricopa.

VIII.

That copies of all process, pleadings and orders served upon petitioner in this action are filed herewith.

Wherefore, petitioner prays that this action be removed to this Court and that said Superior Court of Arizona, in and for the County of Maricopa, shall proceed no further unless this case is remanded.

Dated this 8th day of March, 1958.

/s/ THOMAS F. TOBIN,
Attorney for Defendant.

In the Superior Court of Maricopa County
State of Arizona

No. 97820

LAND DEVELOPMENT AND INVESTMENT COMPANY, a California Corporation,

Plaintiff,

vs.

WESTERN MOTORS SERVICE CORPORATION, a Nevada Corporation,

Defendant.

COMPLAINT

Comes now the plaintiff, and for cause of action against the defendant, complains and alleges as follows:

I.

That plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in San Francisco, California; that the defendant is now, and during all the times herein mentioned was a Nevada Corporation, duly organized and existing by virtue of the laws of the State of Nevada, and plaintiff is informed and believes, and therefore alleges, that said defendant is now and at all times stated herein, has been duly and regularly licensed to do business in the State of Arizona.

II.

That plaintiff is and at all times herein mentioned was the owner of that certain building of which the premises hereinafter described are a part.

III.

That on or about January 15, 1953, plaintiff herein, by written Lease, leased to defendant herein those certain portions of that certain brick and frame building, situated on the northerly line of Folsom Street, between Eighth and Ninth Streets, generally known as 1228 Folsom Street and 723 Clementina Street, San Francisco, California. That said Lease was for a term of five (5) years, commencing February 15, 1953, and under the terms of said Lease defendant herein agreed to pay the sum of Seven Hundred ($700.00) Dollars per month, commencing on the 15th day of February, 1953, and a like sum of Seven Hundred ($700.00) Dollars on the 15th day of each and every succeeding month thereafter, to and including the 15th day of January, 1958.

That further, in and by the terms and provisions of the Lease, the defendant did agree that in the event of any increase during any year of the term of the Lease in the real estate taxes assessed against the property of which the leased premises form a part, over and above the amount of such taxes assessed for the fiscal year of 1952-1953, that said Lessee should thereafter, during the term of said Lease, pay to Lessor the full amount of such

increase, and that said payment shall be deemed and considered to be additional rent under said Lease. That there was an increase in said real estate taxes assessed by the City and County of San Francisco, over said taxes so assessed for the fiscal year 1952 to 1953, for the fiscal years 1955-1956, 1956-1957, and 1957-1958, in the amounts of Two Hundred Thirty-one and 94/100 ($231.94) Dollars, Two Hundred Thirty-seven and 47/100 ($237.47) Dollars, and Three Hundred Sixty-five and 50/100 ($365.50) Dollars, respectively.

That by reason of the foregoing, the defendant became obligated for additional rental in the sum of Eight Hundred Thirty-Four and 91/100 ($834.91) Dollars.

IV.

That defendant has not paid any rental for the periods commencing August 15, 1957, September 15, 1957, October 15, 1957, November 15, 1957, December 15, 1957, and January 15, 1958, at said rate of Seven Hundred ($700.00) Dollars per month, and the total sum of Four Thousand Two Hundred ($4,200.00) Dollars, being rental for said periods, together with additional amount of taxes hereinabove mentioned, in the sum of Eight Hundred Thirty-Four and 91/100 ($834.91) Dollars, or a total sum of Five Thousand and Thirty-Four and 91/100 ($5,034.91) Dollars, is due, owing and unpaid from the defendant to plaintiff, although often demanded.

V.

That in and by the terms and provisions of said Lease, the defendant did agree that in case suit should be brought for the recovery of any rental due under the provisions hereof, that defendant would pay to Lessor, a reasonable attorney's fee to be assessed by the Court as part of the costs of such suit. That a reasonable fee to be allowed herein as attorney's fees, is the sum of Seven Hundred Fifty ($750.00) Dollars.

Wherefore, plaintiff prays for judgment against the defendant in the sum of Five Thousand and Thirty-Four and 91/100 ($5,034.91) Dollars, together with interest on each installment thereof, from the date the same became due, at the rate of six per cent (6%) per annum, and for an attorney's fee herein, in the sum of Seven Hundred Fifty ($750.00) Dollars, and for costs of suit herein incurred, and for such other and further relief as may be meet and proper in the premises.

GUST, ROSENFELD, DIVELBESS & ROBINETTE,
328 Security Building,
Phoenix, Arizona.

By .....
Attorneys for Plaintiff.

[Endorsed]: Filed March 10, 1958.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM

Comes now the defendant in the above-entitled matter and, answering the complaint on file herein, admits, denies and alleges the following:

I.

Defendant admits the allegations of Paragraphs I and II.

II.

Answering Paragraph III, defendant denies that said lease was for a term of five (5) years, commencing February 15, 1953, and under the terms of said Lease defendant herein agreed to pay the sum of Seven Hundred ($700.00) Dollars per month, commencing on the 15th day of February, 1953, and a like sum of Seven Hundred ($700.00) Dollars on the 15th day of each and every succeeding month thereafter, to and including the 15th day of January, 1958.

III.

Answering Paragraph IV, defendant denies that Five Thousand and Thirty-four and 91/100 ($5,034.91) Dollars is due, owing and unpaid from the defendant to plaintiff. Defendant alleges that by the terms of said lease defendant was never obligated to pay a Seven Hundred Dollar rental to defendant on January 15, 1958, and further denies liability as to other rental periods named in Complaint.

IV.

Answering Paragraph V, defendant denies that the sum of Seven Hundred Fifty ($750.00) Dollars is a reasonable figure and alleges that any sum in excess of Three Hundred ($300.00) Dollars is unreasonable.

As for a Second, separate and distinct defense, said defendant alleges the following:

I.

That defendant herein, as lessee, and plaintiff herein as lessor, entered into a written lease covering the premises referred to in plaintiff's complaint herein on January 15, 1953.

II.

That lessee has faithfully fulfilled its duties for many years in maintaining the elevator in accordance with the terms of the lease requiring it to maintain the elevator.

III.

That in and by the terms and provisions of said lease, the defendant, as lessee, did not have the duty to replace the elevator in whole or in part.

IV.

That the loss of the use of the elevator constituted a deprivation of the premises to the defendant resulting in a failure of consideration as concerns defendant's liability; that the building in question was a specific purpose building leased specifically

for warehouse purposes and was of no value to the defendant without elevator service; that the second floor of said building contained much greater footage than the first floor (approximately two-thirds (⅔) of the total area concerned) and that because the elevator constituted the only freight entrance to the second floor the destruction of said elevator resulting from an explosion within the hydraulic system constituted a partial destruction of the premises.

V.

That in and by the terms and provisions of Paragraph Fifteenth of said lease the lessor has the duty to replace the elevator. Paragraph Fifteenth of the lease provides in part:

"That in the event of a partial destruction of the said premises during the said term from any cause, the lessor shall forthwith repair the same provided such repairs can be made within 60 days under the then existing laws and regulations. * * * In the event of any dispute between the lessor and lessee relative to the provisions of this paragraph, they shall each select an arbitrator, the two arbitrators so selected shall select a third arbitrator, and the 3 arbitrators so selected shall hear and determine the controversy * * *"

Webster's New International Dictionary defines "destruction" as "a bringing to naught, ruin, demolition." So far as the lessee was concerned the elevator was in a state of complete destruction and it made no difference whether the elevator had some

working parts or not. Therefore, with the elevator destroyed a partial destruction of the premises resulted which Paragraph Fifteenth provides will be repaired by the Lessor. It should be noted that Paragraph Fifteenth specifically states that if the premises are partially destroyed from any cause, the lessor has the obligation of repair. It, therefore, cannot be successfully argued that to come within the definition, the destruction must be caused by a calamity or act of God. If such was the intention of the parties, then that language should have been used. If Paragraph Fifteenth were not in the lease, Section 1932 of the Civil Code of California would have allowed the lessee to terminate the lease when a material portion of the consideration for the lease perished. In other words, if Paragraph Fifteenth did not abrogate the rights granted by Section 1932 to the lessee, then the lessee would have had the right to terminate this lease. Since that paragraph takes away a right granted to the lessee, it should be construed favorably towards the lessee. Since no paragraph in said lease requires defendant, lessee, to replace the elevator Paragraph Fiftenth placed that burden upon the lessor.

For a counterclaim to the complaint of plaintiff herein defendant alleges that between the 16th day of May, 1956, and the 15th day of July, 1957, the defendant paid to plaintiff Ten Thousand and Fifty ($10,050.00) Dollars. Defendant alleges a complete failure of consideration for the deposits of rental so paid which discharged him from his duty to con-

tinue payments in accordance with said lease and which gave him a right to restitution of payments already made.

Defendant alleges plaintiff's possession of the premises for re-rental to mitigate the rent together with defendant's abandonment of premises constitutes a surrender and further alleges that complete abandonment of the second floor of said premises was impossible without the services of the elevator and so complete abandonment of the premises was excused by virtue of lessee being held a captive tenant. Defendant alleges good faith in trying to settle differences with plaintiff and it was with possible settlement in mind that defendant made said deposits of rent. Defendant alleges that in view of plaintiff's previous bad faith in regard to matters concerning the sprinkler system of the premises defendant felt justified in withdrawing from the premises and suing for damages.

Defendant further alleges that plaintiff's action constituted a deprivation of the premises so bargained for by the terms of said lease and resulted in damages in the form of additional expense to defendant in the amount of Ten Thousand and Fifty ($10,050.00) Dollars. This amount is composed of Eight Thousand Five Hundred and Fifty ($8,550.00) Dollars spent by defendant as additional rent in securing substitute accommodations (the only substitute premises available were secured at a monthly rental of Twelve Hundred and Forty ($1,240.00) Dollars, plus One Thousand Five Hun-

dred ($1,500.00) Dollars additional expense incurred in moving defendant's property from the second floor of said premises without the services of the elevator.

Wherefore, defendant prays for judgment against plaintiff in the amount of Twenty-one Thousand Six Hundred ($21,600.00) Dollars, together with reasonable attorney's fees and court costs.

/s/ THOMAS F. TOBIN,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 31, 1958.

[Title of District Court and Cause.]

MOTION FOR CHANGE OF VENUE

Comes now the defendant above named by and through its attorney undersigned, and moves the court to change the venue of the above action to the United States District Court for the Northern District of California upon the grounds and for the following reasons, to wit:

(1) The convenience of all parties concerned in that the entire transaction upon which the claim and counterclaim are based took place in San Francisco, California.

(2) Plaintiff has filed suit in the trial court of the State of California at San Francisco; the issues

in said suit are identical with those in the above action against the Defendant and Defendant will be greatly inconvenienced if the venue of the above action is not changed.

Dated this 27th day of May, 1958.

/s/ THOMAS F. TOBIN,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 27, 1958.

[Title of District Court and Cause.]

AMENDED ANSWER AND COUNTERCLAIM

Comes now the defendant in the above-entitled matter and, answering the Complaint on file herein, admits, denies and alleges the following:

I.

Defendant admits the allegations of Paragraphs I and II.

II.

Defendant denies the allegations set forth in Paragraphs III and IV.

III.

Answering Paragraph V, defendant denies that the sum of Seven Hundred Fifty ($750.00) Dollars is a reasonable figure and alleges that any sum in

excess of Three Hundred ($300.00) Dollars is unreasonable.

As for a second, separate and distinct defense, said defendant alleges the following:

I.

That defendant herein, as lessee, and plaintiff herein as lessor, entered into a written lease covering the premises referred to in plaintiff's complaint herein on January 15, 1953.

II.

That lessee has faithfully fulfilled its duties for many years in maintaining the elevator in accordance with the terms of the lease requiring it to maintain the elevator.

III.

That in and by the terms and provisions of said lease, the defendant, as lessee, did not have the duty to replace the elevator in whole or in part.

IV.

That in and by the terms and provisions of said lease the lessor has the duty to replace the elevator.

V.

That plaintiff was deprived of the premises by the loss of the use of the elevator in May of 1956, resulting in a failure of consideration as concerns defendant's liability.

Counterclaim

For a Counterclaim to the Complaint of plaintiff herein, defendant alleges that between the 16th day of May, 1956, and the 15th day of July, 1957, the defendant paid to plaintiff Ten Thousand Fifty ($10,050.00) Dollars. Defendant alleges a complete failure of consideration for deposits of rental so paid, which discharged him from his duty to continue payments in accordance with said lease, and which gave him the right to restitution of payments already made.

Defendant further alleges plaintiff's action constituted a deprivation of the premises so bargained for by the terms of said lease and resulted in damages in the form of additional expenses to defendant in the amount of Eleven Thousand Five Hundred Fifty ($11,550.00) Dollars.

Wherefore, defendant prays for judgment against plaintiff in the amount of Twenty-one Thousand Six Hundred ($21,600.00) Dollars, together with reasonable attorney's fees and Court costs.

/s/ THOMAS F. TOBIN,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 10, 1958.

[Title of District Court and Cause.]

INTERROGATORIES BY PLAINTIFF

To: Western Motor Service Corporation,
Defendant:

The Plaintiff requests that the following interrogatories be answered under oath by any of your officers competent to testify in your behalf who know the facts about which inquiry is made, and that the answers be served on Plaintiff within fifteen (15) days from the time these interrogatories are served on you:

Interrogatory No. 1:

State whether or not it is correct that the terms of the lease on which the complaint in this action is based called for payments of $700.00 on the 15th day of February, 1957, and a like sum of $700.00 on the 15th day of each and every succeeding month thereafter to and including the 15th day of December, 1957.

Interrogatory No. 2:

If the answer to Interrogatory No. 1 is in the negative, please specify wherein the terms are incorrect.

Interrogatory No. 3:

State whether or not it is correct that no payments whatsoever were made under this lease by or on behalf of defendant for the periods commencing

August 15th, September 15th, October 15th, November 15th and December 15th, 1957, making a total sum of Thirty-five Hundred ($3500.00) Dollars for rent which remains unpaid under the lease:

Interrogatory No. 4:

If the answer to Interrogatory No. 3 is in the negative, please state what payments were made on what date and if the total sum of Thirty-five Hundred ($3500.00) Dollars is incorrect, what is the total amount of rent remaining unpaid?

Interrogatory No. 5:

Is it correct that the terms of the lease state that the lessee shall pay any increase in real estate taxes assessed by the City and County of San Francisco over said taxes so assessed for the fiscal year 1952 to 1953, and that such increase shall be deemed and considered to be additional rent under said lease?

Interrogatory No. 6:

If the answer to Interrogatory No. 5 is no, please state what the correct terms are.

Interrogatory No. 7:

Are the following increases in real estate taxes assessed by the City and County of San Francisco correct:

1955 to 1956	$231.94
1956 to 1957	237.47
1957 to 1958	365.50

Interrogatory No. 8:

If the sums set forth in Interrogatory No. 7 are incorrect, state in what manner they are not correct and what the proper amounts are for each year so designated above.

Interrogatory No. 9:

Was the defendant in this action, Western Motor Service Corporation, the plaintiff in an action entitled "Western Motors Servicing Corporation vs. Land Development and Investment Co." and reported in 313 P.(2d) 927?

Interrogatory No. 10:

Is it correct that the defendant in that action is the same as the plaintiff herein?

Interrogatory No. 11:

Is it correct that said action reported in 313 P.(2d) 927 involved the same lease and the same elevator referred to by defendant herein in its answer?

Interrogatory No. 12:

If the answer to Interrogatory No. 11 is in the negative, please state with particularity what the differences are.

Interrogatory No. 13:

Is it correct that the defects of the elevator referred to in the above-mentioned declaratory judg-

ment action brought by the defendant herein are the same defects referred to in defendant's answer in this present action?

Interrogatory No. 14:

If the answer to Interrogatory No. 13 is in the negative, please state in detail with appropriate dates as to when the defects or breakdown occurred.

Dated this 16th day of December, 1958.

GUST, ROSENFELD, DIVELBESS & ROBINETTE,

By /s/ LAWRENCE B. SMITH,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 16, 1958.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES

Comes now the defendant, Western Motor Service Corporation, and makes the following answers to Interrogatories propounded by the plaintiff herein:

1. Yes.
2. .....
3. Yes.

4. .....

5. Yes.

6. .....

7. We are unable to say as we have never been supplied 1957 and 1958 tax receipts.

8. .....

9. Yes.

10. Yes.

11. Yes.

12. .....

13. No.

14. The defects mentioned in the above declaratory judgment action were present in addition to other defects not previously mentioned. Exact dates are unavailable as to the defects and breakdowns but records are being gathered to clarify previous negotiations between plaintiff and defendant wherein plaintiff offered to pay fifty per cent of the elevator replacement costs and this offer was refused by defendant. Further investigation is being made through city and county offices to determine the exact dates of condemnation of the elevator.

WESTERN MOTOR SERVICE CORPORATION,

By /s/ LAWRENCE C. IVES,
President.

/s/ THOMAS F. TOBIN,
Attorney for Defendant.

State of Arizona,
County of Maricopa—ss.

On this, the 30th day of December, 1958, before me, Thomas F. Tobin, the undersigned officer, personally appeared Lawrence C. Ives, who acknowledged himself to be the President of Western Motor Service Corporation, a corporation, and that he, as such President, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as President.

In witness whereof I hereunto set my hand and official seal.

[Seal] /s/ THOMAS F. TOBIN,
Notary Public.

My commission expires: 2-26-62.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 31, 1958.

[Title of District Court and Cause.]

INTERROGATORIES BY PLAINTIFF

To: Western Motor Service Corporation,
Defendant:

The Plaintiff requests that the following interrogatories be answered under oath by any of your officers competent to testify in your behalf who know the facts about which inquiry is made, and

that the answers be served on Plaintiff within fifteen (15) days from the time these interrogatories are served on you:

Interrogatory No. 1:

The answer of Defendant to Interrogatory No. 14 previously submitted and filed herein states: "The defects mentioned in the above declaratory judgment action were present in addition to other defects not previously mentioned * * *" To clarify this answer in regard to the "other defects" you are asked: Is it true that these "other defects" existed at the time the declaratory judgment action was brought?

Interrogatory No. 2:

Did the Defendant use the elevator after the breakdown complained of in the declaratory judgment action?

Dated this 16th day of January, 1959.

GUST, ROSENFELD, DIVELBESS & ROBINETTE,

By /s/ LAWRENCE B. SMITH,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 19, 1959.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES

Comes now the defendant, Western Motor Service Corporation, and makes the following answers to Interrogatories propounded by the plaintiff herein:

1. We are unable to say at this time as the complete records are in the possession of the City Safety Inspector for the City of San Francisco, California. We are attempting to secure these records in order to present them at the trial of this case.

2. No.

WESTERN MOTOR SERVICE CORPORATION,

By /s/ LAWRENCE C. IVES,
President.

/s/ THOMAS F. TOBIN,
Attorney for Defendant.

Duly verified.

[Endorsed]: Filed February 2, 1959.

[Title of District Court and Cause.]

MOTION TO AMEND COMPLAINT

Comes Now the Plaintiff, by and through its attorneys, Gust, Rosenfeld, Divelbess & Robinette,

and moves the Court to amend the Complaint filed herein as follows:

I.

In Paragraph IV of Plaintiff's Complaint, change "Four Thousand Two Hundred ($4,200.00) Dollars" to read "Three Thousand Five Hundred ($3,500.00) Dollars"; change "Five Thousand and Thirty-four and 91/100 ($5,034.91) Dollars" to read "Four Thousand Three Hundred Thirty-four and 91/100 ($4,334.91) Dollars"; in the prayer change "Five Thousand and Thirty-four and 91/100 ($5,034.91) Dollars" to read "Four Thousand Three Hundred Thirty-four and 91/100 ($4,334.91) Dollars."

II.

In Paragraph V of Plaintiff's Complaint, change "Seven Hundred Fifty ($750.00) Dollars" to read "Fifteen Hundred ($1,500.00) Dollars."

Rule 15, Federal Rules of Civil Procedure.

GUST, ROSENFELD, DIVEL-
BESS & ROBINETTE,

By /s/ LAWRENCE B. SMITH,
Attorneys for Plaintiff.

[Endorsed:] Filed March 26, 1959.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the Plaintiff, by and through its attorneys, Gust, Rosenfeld, Divelbess & Robinette, and moves the Court to grant Summary Judgment as follows:

I.

That Summary Judgment be granted for and on behalf of plaintiff for the rent as prayed for in plaintiff's Complaint and in accordance with the

"Motion to Amend Complaint," attached hereto, on the grounds and for the reason that there exists between plaintiff and defendant no genuine issue of fact, and plaintiff is entitled to judgment as a matter of law.

II.

That Summary Judgment be granted for and on behalf of plaintiff for the increase in taxes, as prayed for in plaintiff's Complaint, on the grounds and for the reason that there exists between plaintiff and defendant no genuine issue of fact, and plaintiff is entitled to judgment as a matter of law.

III.

That Summary Judgment be granted for and on behalf of plaintiff as prayed for in plaintiff's Complaint, assessing attorney's fees against defendant in such amount as the Court deems reasonable.

IV.

That Summary Judgment be granted on behalf of plaintiff denying defendant's Counterclaim on the grounds and for the reason that said Counterclaim fails to state a claim on which relief can be granted, and in the alternative there is no genuine issue of fact, and plaintiff is entitled to judgment as a matter of law.

Wherefore, plaintiff prays judgment with relief as is set forth in plaintiff's Complaint, as amended, and in Plaintiff's Answer to the Counterclaim.

GUST, ROSENFELD, DIVELBESS & ROBINETTE,

By /s/ LAWRENCE B. SMITH,
Attorneys for Plaintiff.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of California,
City and County of San Francisco—ss.

Morris Stulsaft, being first duly sworn upon his oath, deposes and says:

That he is the President of the Plaintiff in the above-entitled action; that he makes this affidavit in support of the Motion for Summary Judgment filed in this action, and states as follows:

1. That he has read a copy of the complaint filed herein and that in reference to the increased taxes to be paid under the provisions of the lease, the correct amounts of the increases for the years specified in real estate taxes assessed by the City and County of San Francisco are as follows:

1955 to 1956	$231.94
1956 to 1957	237.47
1957 to 1958	365.50

2. That this affidavit is made for use as evidence on behalf of the plaintiff, Land Development and Investment Company, a California corporation, in support of its Motion for Summary Judgment in the above-entitled cause.

/s/ MORRIS STULSAFT.

Subscribed and Sworn to before me this 21st day of January, 1959.

[Seal] /s/ SALLY S. GERRING,
Notary Public.

My Commission Expires: December 6, 1959.

[Endorsed]: Filed March 26, 1959.

In the United States District Court
For the District of Arizona
No. Civ. 2830 Phx.

LAND DEVELOPMENT AND INVESTMENT COMPANY, a California Corporation,
Plaintiff,

vs.

WESTERN MOTORS SERVICE CORPORATION, a Nevada Corporation,
Defendant.

ORDER FOR SUMMARY JUDGMENT

This cause came on to be heard on the Motion of plaintiff for a summary judgment as authorized by Rule 56 of the Federal Rules of Civil Procedure, and it appearing to the court from the affidavit of Morris Stulsaft, President of plaintiff, and from the pleadings and interrogatories that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law, it is

Ordered, Adjudged and Decreed that summary judgment be entered in favor of plaintiff and against defendant for:

1. The sum of Three Thousand Five Hundred ($3,500.00) Dollars as and for rent, together with interest thereon at the rate of six per cent (6%) per annum from April 15, 1959, until paid.

2. The sum of Eight Hundred Thirty-four and 91/100 ($834.91) Dollars as and for additional rent due to increases in taxes, together with interest thereon at the rate of six per cent (6%) per annum from April 15, 1959, until paid.

3. The sum of Three Hundred Fifteen ($315.00) Dollars, being the total amount of interest due on the five (5) installments of rent at six per cent (6%) per annum calculated from the times said installments became due, namely August 15, 1957, September 15, 1957, October 15, 1957, November 15, 1957, and December 15, 1957.

4. Attorney's fee in the sum of $750.00.

5. Costs herein incurred, $35.50.

Dated this 20th day of April, 1959.

/s/ DAVE W. LING,
United States District Judge.

Approved as to form:

/s/ THOMAS F. TOBIN,
Attorney for Defendant.

[Endorsed]: Filed and docketed April 20, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Western Motor Service Corporation, a Nevada corporation, defendant

above named, hereby appeals to the Ninth Circuit from the Order, Judgment, and Decree granting plaintiff's Motion for Summary Judgment.

Dated the 22nd day of April, 1959.

/s/ THOMAS F. TOBIN,
Attorney for Appellant Western Motor Service Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 22, 1959.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records of said Court, including the records in the case of Land Development and Investment Company, a California corporation, Plaintiff, versus Western Motor Service Corporation, a Nevada corporation, Defendant, numbered Civ-2830 Phoenix, on the docket of said Court.

I further certify that the attached original documents bearing the endorsements of filing thereon are the originals of said documents filed in said

case, and that the attached copy of civil docket entries is a true and correct copy of the original thereof remaining in my office.

I further certify that the said documents constitute the record on appeal in said case as designated, and the same are as follows, to wit:

1. Petition for Removal of Civil Action.
2. Complaint.
3. Answer and Counterclaim.
4. Amended Answer and Counterclaim.

4a. Answer to Counterclaim.

5. Defendant's Motion for Change of Venue.
6. Interrogatories by Plaintiff (2 documents).
7. Answers to Interrogatories by Defendant (2 documents).
8. Defendant's Trial Brief.
9. Motion to Amend Complaint.
10. Plaintiff's Motion for Summary Judgment.
11. Memorandum Opposing Motion for Summary Judgment.
12. Order for Summary Judgment.
13. Defendant's Notice of Appeal.
14. Appellant's Statement of Points.
15. Designation.
16. Civil Docket Entries of June 17, 1958; April 6, 1959, and of April 20, 1959, of entry of judgment.

I further certify that the sum of $250.00 has been deposited in the Registry Fund of this Court by the Appellant on April 22, 1959, as cash cost bond on appeal.

Witness my hand and the seal of said Court at Phoenix, Arizona, this 30th day of May, 1959.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

In the United States Court of Appeals
For the Ninth Circuit

No. 16493

WESTERN MOTOR SERVICE CORPORATION, a Nevada Corporation,

Defendant-Appellant,

vs.

LAND DEVELOPMENT AND INVESTMENT COMPANY, a California Corporation,

Plaintiff-Appellee.

APPELLANT'S STATEMENT OF POINTS

In its appeal appellant in the above-entitled action intends to rely upon the point that the District Court erred in concluding that the appellee, plaintiff below, was entitled to Summary Judgment.

THOMAS F. TOBIN,
Attorney for Defendant-Appellant.

[Endorsed]: Filed July 2, 1959.

At a Stated Term, to wit: The October Term A.D. 1958, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City of San Francisco, in the State of California, on Monday, the third day of August, in the year of our Lord one thousand nine hundred and fifty-nine.

Present:

Honorable William Healy, Circuit Judge Presiding,

Honorable Stanley N. Barnes, Circuit Judge,

Honorable David L. Bazelon, Circuit Judge.

[Title of Cause.]

ORDER GRANTING MOTION FOR STAY OF EXECUTION

Ordered motion of appellant for a stay of execution of the judgment of the District Court herein pending determination of the appeal presented by Mr. Hartley Fleishman, on behalf of counsel for appellant, and by Mr. Theodore Monnell, on behalf of counsel for appellee, and submitted to the Court for consideration and decision.

Upon consideration thereof, Further Ordered said motion granted, and execution of judgment of the District Court herein stayed pending determination of the appeal upon condition that the appellant file with the clerk of this Court a supersedeas bond in the amount of Seven Thousand Dollars ($7,000.00) conditioned as required by law.

[Endorsed]: No. 16493. United States Court of Appeals for the Ninth Circuit. Western Motor Service Corporation, Appellant, vs. Land Development and Investment Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed June 2, 1959.

Docketed: June 9, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 16,494

United States Court of Appeals

For the Ninth Circuit

WILLIE A. DAVIS,

Appellant,

vs.

AETNA LIFE INSURANCE COMPANY, CHARLES S. SWANEGAN, DAISY SWANEGAN, and LLOYD W. SWANEGAN, as Administrator,

Appellees.

Upon Appeal from the United States District Court, Southern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

GARRY, DREYFUS, MCTERNAN & KELLER,
703 Market Street,
San Francisco 3, California,
Attorneys for Appellant.

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No. 16,494

United States Court of Appeals
For the Ninth Circuit

WILLIE A. DAVIS,
Appellant,

vs.

AETNA LIFE INSURANCE COMPANY, CHARLES S. SWANEGAN, DAISY SWANEGAN, and LLOYD W. SWANEGAN, as Administrator,
Appellees.

Upon Appeal from the United States District Court, Southern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION.

This case was instituted in the District Court upon a complaint for interpleader filed by Aetna Life Insurance Company. (Tr. p. 2.) As the basis for jurisdiction of the District Court, the complaint alleges that the plaintiff is a corporation incorporated under the laws of the State of Connecticut, that defendants Willie A. Davis and Lloyd W. Swanegan are citizens of the State of California, that defendants Charles

S. Swanegan and Daisy Swanegan are citizens of the State of Oklahoma, and that thereby diversity of citizenship exists. The amount involved is alleged to be in excess of $3,000.00. The foregoing allegations of fact were and are undisputed. The District Court, upon motion for summary judgment filed by defendants Charles and Daisy Swanegan, entered summary judgment against appellant.

The decision was appealed to this Court by Notice of Appeal, dated August 19, 1958. (Tr. p. 60.)

The decision of the District Court is a final decision and the appeal therefrom is within the jurisdiction of this Court of Appeals. (Title 28 U.S.C.A. Sec. 1291.)

STATEMENT OF THE CASE.

Appellant appeals from a summary judgment rendered by the District Court to the effect that appellant take nothing on his claim to the proceeds, amounting to approximately $9,000.00, of two insurance policies on the life of appellant's wife.

The judgment of the lower court was made on a complaint for interpleader filed by the Aetna Life Insurance Company and upon the pleadings thereto and affidavits and other documents supplied to the court.

The interpleader complaint sets forth, in essence, that appellant is the named beneficiary under two employee group policies issued by Aetna, that Charles and Daisy Swanegan are respectively the father and

mother of the deceased wife and that Lloyd W. Swanegan is the administrator of the estate of the deceased wife. The complaint then alleges that the deceased was killed by the act of her husband, appellant here, and that her husband pleaded guilty to the crime of voluntary manslaughter in the state Superior Court for San Diego County and was duly sentenced on such plea.

At a hearing on a motion for summary judgment field by the parents of the deceased, a certified copy of the record of the criminal proceeding was introduced, showing the plea of guilty and conviction thereon. Upon that record the District Court entered judgment denying appellant's claim. During these proceedings appellant was confined in prison, was not represented by counsel and was afforded no opportunity to contest the granting of the motion or to offer evidence concerning the facts which led to his wife's death.

Appellant here seeks reversal of the decision of the District Court on the grounds that the lower court should have ascertained, upon evidence, the actual legal nature of the homicide, that if such evidence had been taken the homicide would have been determined to be involuntary manslaughter, and that appellant was and is entitled to the proceeds of the policies.

ARGUMENT.

A. THE DISTRICT COURT FAILED TO COMPLY WITH ITS DUTY TO ASCERTAIN THE FACTS CONCERNING THE HOMICIDE.

It is the province and duty of the court considering the insurance claim to examine the facts upon which the criminal conviction was based, and not to make its ruling solely on the basis that the insurance claimant was convicted in a criminal proceeding, even in the case of a plea of guilty to the criminal charge.

In *Prudential Ins. Co. of America v. Harrison* (D.C. Cal. 1952), 106 F.Supp. 419, the court said (p. 422):

> "The Court rejects the offered evidence of conviction of manslaughter and the recommendation of the sentencing Judge. These have been urged as the basis for rejection of the wrongdoer's claim. It is the duty of this Court to examine the facts itself and make its own determination, without suggestion from the judgment of court which adjudicated the criminal case."

The same view, namely that the court hearing the interpleader action must exercise its own independent judgment on the facts involved in the homicide, is expressed in *Manufacturers Life Ins. Co. v. Moore,* (D.C. Cal. 1953), 116 Fed. Supp. 171. In this case the beneficiary was tried on a charge of murder and the Superior Court upon a verdict adjudicated that she was guilty of manslaughter in connection with the death of her husband, the insured.

The court states:

> "No one urges *res adjudicata* here, recognizing the applicability of the well-known rule that to

> apply the principle would require that the murder trial be between the same litigants, whereas the record shows that the litigants here were not all adversaries there. This Court must make its own analysis of the facts and reach its own conclusions." (p. 173)

The appellant here was not represented by counsel in the District Court, was confined in prison and was not advised that he could give evidence or even file an affidavit concerning the events which caused the death of his wife. We submit that he should be given an opportunity to do so. We hereby offer to prove, if opportunity is given, that appellant engaged in an argument with his wife when they were in bed in their home, that appellant rose to leave the house and took from under the mattress a gun which he kept there, that a tussle over possession of the gun then ensued, during which tussle the gun discharged and the wife was hit and fatally wounded. Appellant immediately called an ambulance and the police. The police arrived first and took him to jail.

We submit that the actual facts of the homicide indicate that it was involuntary manslaughter. Appellant has been denied his rights under the policies in question by summary judgment, without being given a chance to show what really happened. He should be given that chance.

B. A BENEFICIARY GUILTY OF INVOLUNTARY MANSLAUGHTER IS NOT PRECLUDED FROM RECEIVING THE PROCEEDS OF THE POLICY.

The leading ruling on this point in California is in the case of *Throop v. Western Indemnity,* 49 Cal. App. 322, 193 Pac. 263, holding that involuntary manslaughter amounts to an "accident" within the terms of an insurance policy, and further ruling that a "death which is unintentional, though caused by some neglect or unlawful act of the beneficiary, is within the contract, and ought not to defeat the policy." (P. 325, quoting from *Schreiner v. High Court of Foresters*, 35 Ill. App. 576.)

A clarifying discussion of the courts' rulings and attitudes on this aspect of the case appears in a note in 15 So. Cal. Law Review, at page 103.

This note, discussing the decision in *Metropolitan Life Ins. Co. v. McDavid* (D.C. Mich. 1941), 39 Fed. Supp. 228, is quoted from with apparent approval in *Prudential Ins. Co. v. Harrison,* supra, p. 4. The note states:

> "All the courts seem to agree that murder of the insured by the beneficiary bars a recovery of the benefits. The courts also seem to agree that involuntary manslaughter of the insured, by the beneficiary, does *not* bar recovery."

The Law Review note observes that the reason most often given by the courts for their decisions in these cases is that "public policy forbids that contracts shall receive such an interpretation as will encourage crime, and that to hold otherwise would be to furnish the

party interested the strongest temptation to bring about, if possible, the event insured against." It is, however, clear, the note continues, that the crime of involuntary manslaughter is not of such a nature that allowing recovery by the beneficiary would encourage its commission.

Appellant here maintains that in actual fact he was not guilty of intentionally causing the death of his wife, and that to allow recovery of insurance proceeds in such a case would in no way encourage the commission of intentional homicides for the purpose of collecting insurance benefits.

C. THE PROVISIONS OF THE CALIFORNIA PROBATE CODE CONCERNING SUCCESSION ARE NOT APPLICABLE HERE.

The District Court found below that "the law and public policy of the State of California provides that a person who is convicted of the crime of voluntary manslaughter cannot recover insurance proceeds of insurance policies on the life of said person". (Tr. p. 49.) It is submitted that such is not either the law or public policy of this state.

Section 258, Probate Code, provides that:

> "No person convicted of the murder or voluntary manslaughter of the decedent shall be entitled to any portion of the estate; but the portion thereof to which he would otherwise be entitled to succeed goes to the other persons entitled thereto under the provisions of this chapter."

However, it has been held that the foregoing Probate Code section applies only to succession in probate and does not govern the claim of a husband named as beneficiary to the proceeds of an insurance policy, where the husband has pleaded guilty to manslaughter in connection with the wife's death.

Prudential Ins. Co. v. Harrison, (D.C. Cal. 1952), supra, p. 4.

See also:

In re Lipholm's Estate, 79 C.A. 2d 467, 179 P. 2d 833.

Manufacturers Life Ins. Co. v. Moore, supra p. 4, holds that a conviction of manslaughter does not control the right of a widow, who shot her husband, to receive the proceeds of a policy on her husband's life, since any rights of the beneficiary arose under the laws of contract and insurance.

CONCLUSION.

We submit that it has been amply demonstrated that this court should reverse the summary judgment of the District Court, and that the case should be sent back for proper hearing and consideration in accordance with the decisions and views presented in this brief.

Dated, San Francisco, California,
December 18, 1959.

GARRY, DREYFUS, MCTERNAN & KELLER,
By CHAS. R. GARRY,
Attorneys for Appellant.

No. 16494

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIE A. DAVIS,

Appellant,

vs.

AETNA LIFE INSURANCE COMPANY, CHARLES S. SWANEGAN, DAISY SWANEGAN, and LLOYD W. SWANEGAN, as Administrator,

Appellees.

Upon Appeal From the United States District Court
Southern District of California
Southern Division

APPELLEES' BRIEF

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No. 16494

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE A. DAVIS,

Appellant,

vs.

AETNA LIFE INSURANCE COMPANY, CHARLES S. SWANEGAN, DAISY SWANEGAN, and LLOYD W. SWANEGAN, as Administrator,

Appellees.

Upon Appeal from the United States District Court

Southern District of California

Southern Division

APPELLEES' BRIEF

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION

This case was commenced by Aetna Life Insurance Company by the filing of a complaint for Interpleader in the United States District Court, Southern District of California, Southern Division. The jurisdiction of the court was based on diversity of citizenship and the fact that the amount involved was in excess of $3,000 exclusive of interest and costs of suit.

Upon motions for summary judgment by defendants Charles S. Swanegan and Daisy Swanegan and defendant Lloyd W. Swanegan, as Administrator of the Estate of Sylvia Swanegan Davis, the District Court entered summary judgment against the appellant.

STATEMENT OF THE CASE

Appellees adopt the statement of the case presented in Appellant's Opening Brief saving therefrom and excepting to the fact that appellant "was afforded no opportunity to contest the granting of the motion. . . " (Appellant's Brief, page 3.)

ARGUMENT

A. THE DISTRICT COURT HAD NO DUTY TO ASCERTAIN THE FACTS CONCERNING THE HOMICIDE.

The appellant, Willie A. Davis, was duly served with all pleadings, notices, motions, and other documents in the instant case. The issue of the voluntariness of the

homicide was not raised by the appellant prior to or at the time of summary judgment. The appellant apparently now contends upon appeal that he was deprived of some right because he "was not represented by counsel in the District Court, was confined in prison and was not advised that he could give evidence or even file an affidavit concerning the events which caused the death of his wife". (Appellant's Brief, p. 5.) At no time was appellant deprived of the right to retain counsel of his own choosing in this matter. The fact that he was confined in a prison of the State of California did not preclude him from appearing and offering testimony or evidence in this matter. California Code of Civil Procedure, Section 1995; California Penal Code, Section 2623. The entire file of this case in the District Court (now the transcript on this appeal) is replete with affidavits and motions which were, in fact, filed by the appellant.

The fact that the appellant failed to make out a defense to the interpleader action, failed to avail himself of the opportunity to retain counsel (which could have been done on a contingency fee basis), and failed to avail himself of the opportunity to appear in the matter should not warrant this court awarding a reversal of the summary judgment, which would, in effect, give the appellant another chance to take advantage of his prior omissions.

B. THE PROVISIONS OF THE CALIFORNIA PROBATE CODE CONCERNING SUCCESSION PROCLAIM THE PUBLIC POLICY OF THE STATE OF CALIFORNIA.

The public policy of the State of California in regards to the succession of persons who have voluntarily

killed a relative is clearly and concisely proclaimed in Section 258 of the California Probate Code. This section provides:

> "No person convicted of the murder or voluntary manslaughter of the decedent shall be entitled to any portion of the estate; but the portion thereof to which he would otherwise be entitled to succeed goes to the other persons entitled thereto under the provision of this chapter." (Emphasis added.)

This section, when originally enacted, included only conviction of the crime of murder. In 1955 the section was amended to place voluntary manslaughter in the same category as murder. Review of 1955 Legislation 144 (1955).

Estate of Lysholm, 79 Cal. App. 2d 467, 179 P. 2d 833 (1947) was decided prior to the 1955 amendment, yet the rationale of this case is that a mere conviction, without more, precludes a person convicted of voluntary manslaughter from participating in the insurance proceeds on the life of his deceased victim. The case involved a husband convicted of manslaughter in the killing of his wife and, while the court determined that Section 258 of the California Probate Code did not apply because manslaughter was not expressly provided for therein, the court stated "if there be a conviction of murder, then neither the murderer nor his heirs have any rights to the insurance money". (Emphasis added.) This is a direct indication that the court construes Section 258 of the California Probate Code to include within its terms the public policy of the state in respect to insurance as well as general succession in probate. See also Beck vs. West Coast Life Insurance Co., 38 Cal. 2d 643, 241 P. 2d

544 (1952); Drown vs. New Amsterdam Casualty Co., 175 Cal. 21, 165 Pac. 5 (1917).

> "A beneficiary under a life insurance policy who murders the insured may neither receive nor retain the benefits of the policy, since it would be unconscionable to allow him to profit from his own wrong. Under this rule, where one insures his own life for the benefit of another person, and the beneficiary murders or unlawfully kills the insured, public policy will not allow such beneficiary to recover on the policy." (Emphasis added.) 28 Cal. Jur. 2d, Insurance §569, p. 828.

The most recent case construing Section 258 of the California Probate Code is Abbey vs. Lord, 168 Cal. App. 2d 499, 336 P. 2d 226 (1959). In this case a husband killed his wife, entered a plea of guilty to manslaughter and the court determined the same to be voluntary. The administrator of the deceased wife's estate brought a quiet title action to establish a constructive trust in property held jointly by the husband and wife. The court held that Section 258 of the California Probate Code was not directly applicable but that the 1955 amendment to that section clearly established that the Legislature does not favor the policy of giving property benefits to murderers or persons convicted of voluntary manslaughter. The opinion indicates that the case was decided on the mere record of conviction and nothing more.

The cases of Prudential Insurance Co. of America vs. Harrison, 106 Fed. Supp. 419 (S. D. Cal. 1952) and Manufacturers Life Insurance Co. vs. Moore, 116 Fed. Supp. 171 (S. D. Cal. 1953) cited by appellant are clearly distinguishable from the instant case. In the Harrison

case the husband had been charged with the murder of his wife but the court in the criminal case accepted a plea of guilty to manslaughter and declined to classify the manslaughter as either voluntary or involuntary. The court in the Harrison case made an independent determination of the facts of the homicide, finding that California Probate Code Section 258 was inapplicable from its language. The court rejected Section 258 because the case was not a murder case and because the issue was not a probate matter but concerned insurance proceeds. It is submitted that rejection of Section 258 was only necessary because of its then existing language. In Beck vs. West Coast Life Insurance Co., 38 Cal. 2d 643, 241 P. 2d 544 (1952), the court stated:

> "In the case of intestate succession there is a specific statutory provision preventing a convicted murderer from succeeding to any part of the estate of his victim and providing how the murderer's share should be distributed. (Probate Code, Section 258.) Although there is no such specific provision governing the disposition of the proceeds of life insurance, it may be contended that the public policy expressed in the Probate Code prevents the passage of either equitable or legal title to the murderer."

The determination of the facts surrounding the homicide was due only to the fact that a prior determination of voluntariness had not been made. In the instant case there has been a judgment of conviction of voluntary manslaughter and the applicable language of Section 258 of the California Probate Code is the present wording reflecting the 1955 amendment.

The Moore case again involves an unclassified manslaughter in a case decided prior to the 1955 amendment of Section 258. Again there was necessity for an independent determination of the facts of the homicide because there was no conviction of record which would be encompassed within an expressed public policy of this state as then declared by statute. The Court in the Moore case then proceeded to relate its findings on the issue of the homicide and came to a conclusion that indicates the homicide to be voluntary manslaughter. Such independent determination is unnecessary in the instant case due to the fact that the plea of guilty and judgment of conviction are for voluntary manslaughter and such is now expressly included within the wording of California Probate Code Section 258.

The conviction of voluntary manslaughter standing alone is proof that Willie A. Davis feloniously killed his wife. There is general agreement that public policy precludes a beneficiary who has feloniously killed the insured from recovering the proceeds of the insurance under the insurance contract. Anno: Killing of Ancestor--Succession, Section 17, 39 A. L. R. 2d 500.

In each and every case that appellant has cited in his brief and in all of the cases found by appellee, the courts have used California Civil Code Sections 2224 and 3517 to preclude the one guilty of voluntary manslaughter or murder from sharing the insurance proceeds of his or her ancestor. Section 3517 provides: "No one can take advantage of his own wrong". One who has been convicted of the voluntary manslaughter of the person on whose life the insurance was carried is certainly a person attempting to take advantage of his own wrong. It is submitted that the conviction, without more, amply

justifies a court in entering summary judgment that such convicted person take nothing by way of insurance on the life of his victim. The Harrison and Moore cases, supra, were decided as they were because a determination had not been made of the degree of manslaughter for which the conviction stood. In the instant case there is no dispute that Willie A. Davis pleaded guilty to and stands convicted of voluntary manslaughter. It would be folly to declare that a rule of law dictates that in a civil case a court must disregard the conviction and redetermine the merits of the criminal case to ascertain whether or not the felon is attempting to profit by a wrong for which he already stands convicted.

CONCLUSION

Appellees respectfully submit that the foregoing authorities amply support the correctness of the decision of the District Court given by Summary Judgment in this matter and submit that such judgment must be affirmed.

DATED: January 21, 1960
San Diego, California.

LUCE, FORWARD, HAMILTON & SCRIPPS

By Robert E. McGinnis
Attorneys for Appellees Charles S. Swanegan and Daisy Swanegan

ORFIELD & THOMPSON
Attorneys for Appellee Lloyd W. Swanegan, as Administrator.

No. 16,494

United States Court of Appeals

For the Ninth Circuit

WILLIE A. DAVIS,

Appellant,

vs.

AETNA LIFE INSURANCE COMPANY, CHARLES S. SWANEGAN, DAISY SWANEGAN, and LLOYD W. SWANEGAN, as Administrator,

Appellees.

Upon Appeal from the United States District Court, Southern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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Table of Authorities Cited

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No. 16,494

United States Court of Appeals

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WILLIE A. DAVIS,

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Appellees.

Upon Appeal from the United States District Court, Southern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

Appellees' brief herein suggests little to the court which has not been presented and discussed in appellant's opening brief. However, it is deemed in order briefly to restate and amplify upon appellant's position before this court.

In the first place, all parties agree that a beneficiary whose actual conduct in causing the death of the insured amounts in fact to voluntary manslaughter cannot, for reasons of public policy, receive the benefits of the insurance policy.

It is, on the other hand, clear that conduct of a beneficiary which amounts only to gross negligence or even involuntary manslaughter does not preclude recovery.

Throop v. Western Indemnity, 49 Cal. App. 322, 193 Pac. 263.

Appellant's case, then, rests upon two points:

1. That the trial court did not exercise its duty to ascertain the true facts of the homicide, as required by the decisions in

Prudential Ins. Co. of America v. Harrison (D.C. Cal. 1952), 106 Fed Supp. 419;

Manufacturers Life Ins. Co. v. Moore (D.C. Cal. 1953), 116 Fed. Supp. 171.

2. That if the appellant had been afforded an opportunity to prove the true facts, the homicide would have been revealed to be involuntary manslaughter.

Not only was no opportunity afforded appellant to present the facts, but he was in no position to move the court to do so, being incarcerated in a state prison.

In re Bagwell, 26 Cal. App. 2d 418, 79 Pac. 2d 395.

The motions and affidavits with which the record is "replete", as appellees say, were filed after the court's decision, and did not deal with the points raised here.

There can be no question but that the decision of the District Court was based entirely on the fact of the conviction of appellant as a defendant in the criminal court, and that the provisions of Section 258 of the Probate Code were relied upon to justify this result.

When the court made its decision it had before it only the brief filed by the Swanegans. This brief maintained that by reason of the provisions of Probate Code, section 258, and the "public policy" resulting therefrom, appellant's "presence at the trial is not required and his being incarcerated is no bar to bringing the matter to trial." (Tr. p. 37.) On the basis of this reasoning the court entered a summary judgment without knowledge of the true facts of the death of the insured.

All courts considering the question have ruled that the provisions of Section 258 apply only to succession of property and do not govern cases not concerned with rights of succession in probate.

In the *Harrison* case, supra, p. 2, the court says:

> "That this enactment has no application appears from its language. It applies an artificial standard, i.e., 'conviction' of murder . . . Further, the statute relates only to succession in probate, which is an entirely different circumstance than is presented here." (p. 421)

And, again, the court rules:

> "If the beneficiary is barred from recovery, it must be upon the circumstances of the violent death, not upon the record of the criminal litigation." (p. 422)

In the *Moore* case, supra, p. 2, with reference to Probate Code, section 258, the view of the court is that:

> "The statute mentioned is a probate law only and refers to the effect of a criminal court judg-

ment and not to the facts upon which the judgment rests." (pp. 173, 174)

For a recent case decided after the amendment of Probate Code, section 258 to include voluntary manslaughter, see,

Abbey v. Lord, 168 Cal. App. 2d 499, 336 Pac. 2d 226.

In that case, involving the right to joint tenancy property of a joint tenant found in a criminal proceeding guilty of voluntary manslaughter, the court recognized that the Probate Code section did not apply, but upheld the trial court's ruling, *on evidence presented in the civil trial,* that the joint tenant's intentional killing precluded his claim.

In none of the cases ruling upon the points here involved is any mention made of the failure of the criminal court to find the specific nature of the manslaughter, voluntary or involuntary. The courts considering the insurance question did not go into the matter of determining the actual facts of the homicide for the reason that the judge in the criminal trial had not determined the exact nature thereof. They rule, specifically and without any lack of clarity, that the findings and judgment in the criminal proceeding are not binding upon the parties to the civil action, and that the court in the civil action must make its own determination. This was not done here.

We submit that appellant should by order of this court be afforded the opportunity of presenting the true facts of the homicide and that if such facts lead

to a conclusion that the homicide was involuntary the appellant should be entitled to the proceeds of the policy. No rule of law or public policy stands against this conclusion.

Dated, San Francisco, California,
February 9, 1960.

Respectfully submitted,
SOLOMON E. JOHNSON,
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No. 16494

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIE A. DAVIS,

Appellant,

vs.

AETNA LIFE INSURANCE COMPANY, CHARLES S. SWANEGAN, DAISY SWANEGAN, and LLOYD W. SWANEGAN, as Administrator,

Appellees.

Upon Appeal From the United States District Court
Southern District of California
Southern Division

APPELLEES' PETITION FOR REHEARING

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE A. DAVIS,

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AETNA LIFE INSURANCE COMPANY, CHARLES S. SWANEGAN, DAISY SWANEGAN, and LLOYD W. SWANEGAN, as Administrator,

Appellees.

Upon Appeal from the United States District Court

Southern District of California

Southern Division

APPELLEES' PETITION FOR REHEARING

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION

A decision in this case was rendered on May 21, 1960, by the United States Court of Appeals for the Ninth Circuit wherein the judgment entered in the United States District Court was reversed and the cause was remanded for further proceedings. Pursuant to Rule 23 of the United States Court of Appeals, appellees herewith petition for a rehearing on the two grounds hereinafter set forth.

Appellees refer to and adopt the statement contained in the Appelleees' Brief regarding the facts and matters affecting jurisdiction.

STATEMENT OF THE CASE

Appellees adopt the statement of the case presented in Appellant's Opening Brief saving therefrom and excepting to the fact that appellant "was afforded no opportunity to contest to the granting of the motion . . ." (Appellant's Brief, page 3.)

ARGUMENT

A. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT MISSTATED THE CASE, AND SUCH MISSTATEMENT IS MATERIAL TO THE ULTIMATE DECISION.

On page 3 of the opinion of the United States Court of Appeals it is stated:

> "Following several pre-trial conferences, of which the appellant was given notice but at which his incarceration prevented his appearance, the parents of the deceased insured and the administrator filed motions for summary judgment in their favor under the provisions of Rule 56 of the Federal Rules of Civil Procedure. The appellant was notified of the time and place of the hearing of such motions, but of course was unable to be present. " (Emphasis added)

Reference is made to Appellee's Brief, and specifically the statement of the case set forth on page 2. The appellees thereby adopted the statement of the case presented in the Appellant's Opening Brief but excepted to the fact that appellant "was afforded no opportunity to contest the granting of the motion . . ." (Appellant's Brief, page 3; Appellees' Brief, page 2.)

Reference is also made to the first argument in Appellees' Brief wherein it is stated:

> "At no time was appellant deprived of the

> right to retain counsel of his own choosing in this matter. The fact that he was confined in a prison of the state of California did not preclude him from appearing and offering testimony or evidence in this matter. California Code of Civil Procedure, Section 1995; California Penal Code, Section 2623. The entire file of this case in the District Court (now the transcript on the appeal) is replete with affidavits and motions which were, in fact, filed by the appellant." (Appellees' Brief, page 3.)

In reading the opinion of the United States Court of Appeals in this case it appears that the majority opinion relied on the misconception that the appellant was prevented from appearing at the trial of this case due to his incarceration. However, the findings of fact of the District Court quoted in the opinion do not support the conclusion therein stated to the effect that the District Judge concluded that the appellant was not able to participate in the trial proceedings. It is respectfully requested that a rehearing be had in this matter to clarify this particular point in that it appears that the decision of the United States Court of Appeals may in fact be based on a misconception of the California law and of the facts in this particular case.

B. THE OPINION OF THE UNITED STATES COURT OF APPEALS MISCONSTRUES THE CASE OF ABBEY VS LORD, 168 CAL.APP. 2d 499, 336 PACIFIC 2d 226 (1959), AND SUCH MISCONSTRUCTION IS MATERIAL TO THE DECISION.

The case of Abbey vs. Lord, 168 Cal. App. 2d 499, 336 Pacific 2d 226 (1959), was cited by appellees for the proposition that the provisions of the California Probate Code concerning succession proclaimed the public policy of the state of California. At page 505 the California District Court of Appeal states:

> "Probate Code Section 258, was amended in 1955, and disinherison (sic) was extended to one convicted of voluntary manslaughter. This amendment clearly establishes that the legislature does not favor the policy of giving property benefits to murderers or persons convicted of voluntary manslaughter."

The quote taken by the majority opinion from page 504 of the case of Abbey vs. Lord, and particularly the first sentence thereof, clearly states the basis of the decision:

> "The decisive fact in the case at bar is the voluntary, unlawful, felonious killing of one joint tenant by the other as distinguished from an unintentional killing."

One should not be misled by the fact that in the Abbey case, supra, the facts concerning the killing are recited. It appears that the facts recited in the majority

opinion and in the Abbey case, supra, were not taken in the civil case but on the defendant's plea of guilty in the criminal case. In the civil case, the conviction was received by way of stipulation. It is from this fact that the Appellees' Brief stated that the opinion in the Abbey case, supra, indicated that the case was decided upon the mere record of the conviction rather than evidence taken in the civil action.

CONCLUSION

Appellees respectfully submit that a rehearing of this matter should be granted in order to resolve what appears to be a misstatement and a misconception of the Appellees'' appeal, as reflected by the majority opinion of the United States District Court of Appeals.

DATED: June 17, 1960

San Diego, California

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HAMILTON & SCRIPPS

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No. 16504

United States
COURT OF APPEALS
for the Ninth Circuit

FRANK A. DUDLEY, as Trustee of the Estate of Merle K. Branch and Wanda B. Branch, Co-partners d/b/a Riddle General Store, Bankrupts,

Appellant,

v.

CLIFFORD E. DICKIE and MARION E. DICKIE,

Appellees

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

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No. 16504

United States
COURT OF APPEALS
for the Ninth Circuit

FRANK A. DUDLEY, as Trustee of the Estate of Merle K. Branch and Wanda B. Branch, Co-partners d/b/a Riddle General Store, Bankrupts,

Appellant,

v.

CLIFFORD E. DICKIE and MARION E. DICKIE,

Appellees

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

STATEMENT OF PLEADINGS AND FACTS UPON WHICH JURISDICTION IS BASED

On July 6, 1957, Wanda B. Branch and Merle K. Branch, co-partners d/b/a Riddle General Store, filed in the United States District Court for the District of Oregon, in bankruptcy, a petition praying for adjudication as bankrupts. Thereafter on July 11, 1957, said co-partnership and its members were duly adjudged bankrupts, and their estates are being administered by

said Court in Case No. B-40999. Thereafter Frank A. Dudley was elected Trustee of the estate of said bankrupt partnership and duly qualified by filing bond, and ever since has been the duly elected qualified and acting Trustee of said estate.

Said Trustee filed in the United States District Court for the District of Oregon, in bankruptcy, a suit as Trustee for the said bankrupt, to recover from defendants an alleged preference under Section 60(b) of the Bankruptcy Act. 11 U.S.C.A. Sec. 96.

This suit arises under said Section 60(b) of the Bankruptcy Act and is brought in the United States District Court for the District of Oregon, sitting as a Court of Bankruptcy, as provided by Section 2(a), 11 U.S.C.A. Sec. 11, of said Act granting jurisdiction of such preference suit (Tr. 3). Said United States District Court in said suit entered judgment for the defendants therein, and appellant Trustee prosecutes this appeal from said adverse judgment.

Jurisdiction of this Court is based upon Title 11 U.S.C.A. Sec. 47.

STATEMENT OF THE CASE

On July 1, 1957, and for approximately two years immediately prior thereto, Wanda B. Branch and Merle K. Branch were co-partners doing business as Riddle General Store and operated a general store at Riddle, Oregon, having purchased said business, including fixtures and equipment and a stock of merchandise pursuant to a conditional sales contract (Ex. 2). Said condi-

tional sales contract was not acknowledged so as to entitled it to be recorded, but nevertheless was recorded on June 21, 1957, in the Chattel Mortgage Records of Douglas County, Oregon, which recording was of no legal effect as conceded by the defendants (Tr. 5).

The bankrupts operated said business from April 11, 1955, until on or about July 1, 1957, and during said period of time sold merchandise purchased by them from defendants and replenished same by other merchandise purchased from others on open account (Tr. 54).

On June 21, 1957, and for several months prior thereto, the bankrupts were in default in the making of payments required by said conditional sales contract. By reason of said default, on or about June 21, 1957, appellees commenced in the Circuit Court of the State of Oregon for the County of Douglas a suit against said bankrupts to recover from bankrupts the furniture, fixtures, and the stock of merchandise then in the bankrupts' possession, and in the complaint in said suit prayed for a decree finding them to be the absolute owners of said furniture, fixtures, and stock of merchandise (Ex. 3). In said suit, the bankrupts, on July 1, 1957, stipulated in writing that defendants were the owners of said furniture, fixtures, and stock of merchandise and were entitled to immediate possession of same (Ex. 4), and based thereon a decree was entered on July 1, 1957, in said State Court proceeding, declaring in terms that defendants were the sole owners of said assets (Ex. 5).

On or about said July 1, 1957, said defendants took possession of said assets, including the inventory of merchandise then on hand, which inventory was in the amount of $14,786.17 (Tr. 6), and thereafter retained possession of same notwithstanding the demand of the Trustee on October 4, 1957, that defendants return to him said merchandise for administration in said bankruptcy proceedings (Tr. 6).

At all times between June 21, 1957, and July 1, 1957, inclusive, said bankrupts, individually and as co-partners, were insolvent in that the fair market value of their assets was less than the amount of their liabilities (Tr. 6-7), and that the Trustee has on hand the sum of $1,374.44, has no further assets to be liquidated, and that provable claims have been filed in the bankruptcy proceedings as follows:

a. Priority claims	$ 3,273.32	
b. General claims	11,534.48	(Tr. 7)

The District Court held that the State Circuit Court found that the appellees were the owners of, and held legal title to said merchandise, as distinguished from being mortgagees or lien holders, and that said finding was res judicata and binding upon the Trustee in this preference proceeding, and that since on the date of receipt by appellees of said merchandise from the bankrupts, appellees were the owners thereof, they were in the position of a conditional seller recovering the conditionally sold property and, therefore, no preference could result (Tr. 15-18).

Thus the principal question involved in this appeal

is whether the stipulated decree in the State Court proceeding is res judicata in this suit as to whether or not immediately prior to said State Court proceeding appellees were the holders of an equitable lien in the nature of an unrecorded chattel mortgage upon the merchandise as distinguished from legal title owners thereof.

If this Court determines that the matter is not res judicata, then the Court must determine the supplementary question as to whether appellees can claim ownership to approximately one-half of the merchandise by reliance upon the testimony of one of the bankrupts that approximately that amount was still on hand on July 1, 1957 or whether appellees, having allowed their merchandise to become confused with the after-acquired merchandise must specifically point out and identify their own merchandise from the mass.

SPECIFICATION OF ERRORS

The Court erred in the following particulars:

1. The Court erred in failing to find that immediately prior to said State Court proceeding appellees held an equitable lien in the nature of an unrecorded chattel mortgage upon the merchandise which equitable lien was perfected as against third parties, including appellant Trustee, upon appellees' acquisition of possession of said merchandise on July 1, 1957 through the medium of said decree and, therefore, constituted a transfer within the meaning of Section 60 of the Bankruptcy Act on said date.

2. The Court erred in finding as a matter of fact and concluding as a matter of law that the decree of the Circuit Court for Douglas County, Oregon, dated July 1, 1957, was res judicata and conclusive of the rights of the Trustee in this preference suit and was an enforcement of a valid pre-existing contractual right and not a lien obtained by a judgment within the definition of Section 67 of the Bankruptcy Act and that, therefore, appellees did not obtain a preference when they received the after-acquired merchandise.

3. The Court erred in failing to find that on July 1, 1957 said bankrupts, individually and as copartners, were insolvent, and that appellees had reasonable cause to believe they were so insolvent and that the transfer was a transfer of bankrupts' property in payment of an antecedent debt, namely, the upaid purchase price under the contract dated April 11, 1955 and that said transfer resulted in appellees' receipt of a greater portion of their debt than other creditors of the same class.

4. The Court erred in failing to find that the transfer of said merchandise on July 1, 1957 resulted in preference voidable under Section 60 of the Bankruptcy Act.

5. The Court erred in failing to legally conclude that appellant was entitled to judgment against appellees, and each of them, in the sum of $14,986.17 with interest at six per cent per annum from October 4, 1957 until paid.

SPECIFICATION OF ERROR NO. 1

The Court erred in failing to find that immediately prior to said State Court proceeding appellees held an equitable lien in the nature of an unrecorded chattel mortgage upon the merchandise which equitable lien was perfected as against third parties, including appellant Trustee, upon appellees' acquisition of possession of said merchandise on July 1, 1957 through the medium of said decree and, therefore, constituted a transfer within the meaning of Section 60 of the Bankruptcy Act on said date.

ARGUMENT POINT 1

The conditional sales contract between the Dickies and the Branches was, as to third parties and as to after-acquired merchandise, in legal effect, an unrecorded chattel mortgage.

Davis v. Wood, 200 Or. 602, 623, 268 P.2d 71, 380 (1954).
Kliks v. Courtemanche, 150 Or. 332, 346, 43 P.2d 913, 918 (1935).
In re Chappell, 77 F. Supp. 573 (1948).
Caldwell Finance Co. v. McAllister, 226 F.2d 189 (9th Cir. 1955).
Hughbanks v. Gourley, 12 Wash. 2d 44, 120 P.2d 523, 525 (1941).

The contract provided for the sale of the business, including the stock of merchandise and contained the following provisions:

"Purchasers agree that they will at all times keep up the inventory of said business to the full sum of $22,000.00 and will at all times keep said stock of

merchandise insured against loss by fire, damage by smoke or water, in the sum of $22,000.00 and said fixtures in the sum of $2,000.00. All policies of insurance to be so written as to set forth the interest of the Sellers and the Purchasers.

"Notwithstanding the fact that the Purchasers shall have the right to sell merchandise from the stock on hand and continue to operate said business in a regular and general manner, the title to said fixtures and inventory shall in the event of default, as well as at all times herein mentioned, shall remain in the Sellers until the full balance of purchase price and interest as herein provided has been fully paid.

"Purchasers agree that they will pay for all merchandise delivered to said business as the same is received to the end that all such merchandise shall become a part and parcel of the stock and inventory and the title immediately vested in the Sellers, subject only to right of the Purchasers as in this contract provided."

Said contract also provides as follows:

"If purchasers default in any of the payments when due, or breach any of the provisions of this contract, or the lease herein referred to, or if said within property is attached or levied upon under any writ or process of any court, or if Purchasers are declared bankrupts, or upon any unusual or unreasonable depreciation in the value of the property, or if the Sellers feel insecure, of which the Sellers shall be the sole judges, Sellers may, at their option, without previous demand or notice, exercise any one of the following three options.

1. Retake possession of said within property, with or without process of law; and all payments theretofore made hereunder shall thereupon be forfeited to Sellers and this contract shall therefore terminate and all rights of Purchasers in this contract and said within described property shall thereupon cease and are hereby waived; or

2. Sellers may declare the whole of the sums then remaining unpaid to be immediately due and payable and sue therefor, or
3. Sellers may retake possession of the said herein described property, with or without process of law and cause said within described property to be sold either at public auction or private sale or Sellers may foreclose this contract in strict foreclosure in the manner provided by law.

"In the event suit be instituted to foreclose this contract, Sellers shall have the right to apply to the court in which said proceeding is commenced for the appointment of a receiver to take possession of the business and the personal property and the leased premises and to carry on the business, said receiver to make an accounting to the court on the conduct of said business. In the event suit be instituted to foreclose as aforesaid and a receiver is appointed, Purchasers agree to pay such additional sum as the court shall fix as reasonable attorney's fees in said foreclosure proceedings, as well as a reasonable receiver's fee and reasonable attorney's fees for the attorney who may represent the receiver in any such proceeding.

"Notwithstanding anything to the contrary herein contained or any of the other obligations or rights of the parties hereto, Purchasers agree that they will, at least once each year, furnish to Sellers the complete inventory of the stock and merchandise then on hand. In the event said inventory shows that Purchasers are not maintaining the full amount of merchandise and stock as in this contract provided, then the Purchasers will forthwith increase the stock of merchandise to comply with the terms of this contract."

There is some serious question in the mind of the writer as to whether a fair interpretation of the default provisions refers to more than the original merchandise

and inventory because it constantly uses the expression "retake possession" when it is obvious that prior to default the sellers would never have possession of the after-acquired merchandise. However, assuming that the contract provisions are broad enough to include the after-acquired merchandise, then appellant contends that all that the appellees had with regard to said after-acquired merchandise was a lien in the nature of a chattel mortgage.

By definition, a "conditional sales contract" is a document designed to retain title in the seller of property sold by him, and it is not the office of the conditional sales contract to provide security upon property never owned or sold by the party to whom the conditional sales contract is given.

The above conforms to logic but is also supported by abundant legal authorities. In Davis v. Wood, 200 Or. 602, 268 P.2d 371 (1954) the facts were as follows:

> Seller sold upon conditional sales contract certain restaurant equipment and fixtures, and under and pursuant to the contract, purchasers were required to purchase and install additional fixtures of approximately $2,500.00; and the contract provided that: such additional personal property and fixtures shall be deemed and considered as part of the sellers' property which they are hereby selling under the contract to the buyer, and all of the terms and conditions heretofore mentioned in this contract shall apply to all of such additional property installed by the buyer and all other additions which he may make or install during the term of this contract.

Plaintiff brought a suit for declaratory judgment

and requested the Court to declare a forfeiture of the conditional sales contract and to quiet title in plaintiff to all of the property, including the additionally-acquired property.

In connection with the additionally-installed property, the Court stated on pages 623, 380:

> ". . . We agree that the additional property purchased and installed by the plaintiff became security for any sum which may be found to be due to the defendants, but we hold that it did not become the property of the vendors when it was first purchased and installed. The following cases indicate that an agreement, in form a conditional sales contract, should be treated in equity as a chattel mortgage when the purpose of the transaction is to give to the person named as the conditional seller, security in property which he never owned and therefore could not have sold. Bell v. Hanover Fire Ins. Co., 107 Or. 513, 214 P. 340, 215 P. 171; Kliks v. Courtemanche, 150 Or. 332, 43 P2d 913. In Borengasser v. Chatwell, 207 Ark. 608, 182 SW2d 389, the vendor sold the assets of a business, retaining title until the full purchase price should be paid. The contract provided:
>
> > '. . . that the seller should have title not only to the "present assets" of the business "but is to be given title to any new merchandise purchased for said company until the entire purchase price referred to herein has been paid." Another clause provides that the buyer should keep the stock and assets up and in good condition, take care of the accounts both payable and receivable and pay taxes. On failure to comply with any provision of the contract, purchaser agreed to deliver possession of said assets on demand to seller.'
>
> "On default of the buyer the assignee of the seller brought action to establish and enforce a vendor's

lien on all of the assets, including the after-acquired property. The Supreme Court held that the sellers were not entitled to a declaration of a vendor's lien under Section 11422 of Pope's Digest and that the statute contemplated that one must be the vendor of the chattels if he is to have the benefit of a vendor's lien. The court then said:

> 'But as to the chattel assets acquired by Borengasser after the original sales contract, Chatwell was not the vendor, was never the owner, and it is difficult to perceive how he or his assignee could establish a vendor's lien on property he did not own and did not sell. As to this, we think the court erred in declaring and attempting to enforce such a lien. Not having the right to such a lien, appellee had no right to an attachment of this property and the court erred in sustaining it to this extent only, because the title to the so-called "new property" was never in appellee. Ferguson v. Hetherington, 39 Ark. 438.
>
> 'We think the contract here involved was ineffectual insofar as it attempted to put the title to the "new property" in appellee so as to give her a vendor's lien under said statute, but we agree with appellants that it did give her an equitable lien on said assets acquired subsequent to the date of said contract which lien might have been enforced in a court of equity . . .' "

The principle applied in that case is applicable here.

In the case of Kliks v. Courtemanche, 150 Or. 332, 43 P.2d 913 (1935), the seller therein attempted to use a document, in form a conditional sales contract, to secure him for a previously incurred open account. The Court in that case, on pages 346, 918, stated as follows:

> "We are unwilling to extend our conception of what may constitute a conditional sale contract to include the transaction between Phelps and the defendant

culminating in the execution of the instrument of December 5, 1931. Conditional sale contracts are affected with secretiveness by nature, and their function can be much abused. They should not be employed to displace chattel mortgages which to afford protection to the mortgage must be recorded."

The United States District Court for the District of Oregon in In re Chappell, 77 F. Supp. 573 (1948) similarly held in connection with trust receipt transactions.

This Court in Caldwell Finance Co. v. McAllister, 226 F.2d 189 (1955) approved of Kliks v. Courtemanche (Supra).

The Washington Supreme Court in Hughbanks v. Gourley, 12 Wash. 2d 44, 120 P.2d 523, 525, stated the matter as follows:

"This court has held that it is not the office of a conditional bill of sale to secure a loan of money. Its purpose, rather, is only to permit an owner of personal property to make a bona fide sale on credit, reserving title in himself, for security, until the purchase price is fully paid. Lyon v. Nourse, 104 Wash. 309, 176 P. 359. This particular security device, with its severe remedial incidents, is not favored in the law and its use has been restricted to situations where persons standing in the actual relation of vendor and vendee have desired to effect a credit sale. It is in such cases that it finds its only legitimate use.

"Where on the other hand, one who is the owner of a particular chattel wishes to borrow money and is willing to let the chattel stand as security for his debt, a chattel mortgage is the appropriate means for affording such protection to the creditor. And this is as true where the property mortgaged is purchased with the borrowed funds as where it has long been in the borrower's possession."

Thus, under the existing state of both Oregon and Federal law, the only position which defendants can successfully assert, is that on July 1, 1957, and immediately prior to the transfer of the merchandise to them, they were as to said after-acquired merchandise in the position of chattel mortgagees by virtue of an unrecorded instrument in the nature of a chattel mortgage.

ARGUMENT POINT 2

Said unrecorded chattel mortgage was not valid as against attaching creditors (and a trustee in bankruptcy) until the rights of the Dickies were perfected by their taking of possession on or about July 1, 1957.

Bankruptcy Act, Section 60, 11 U.S.C.A. Section 96.
Oregon Revised Statutes, Section 86.420.
Oregon Revised Statutes, Section 29.150.
Bankruptcy Act, Section 70c, 11 U.S.C.A. 110.
In re Chappell, 77 F. Supp. 573 (1948).
First National Bank of Burns v. Frazier, 143 Or. 662, 688, 19 P.2d 1091, 22 P.2d 325, 333 (1933).

As conceded by appellees, said conditional sales contract although physically placed in the chattel mortgage records on June 21, 1957, lacked an acknowledgement, so that its recording was of no legal effect; and, therefore, on the date of acquisition of possession by appellees, said instrument should be considered as unrecorded for the purposes of this case.

Section 60 of the Bankruptcy Act, 11 U.S.C.A. Section 96, provides in part as follows:

"(2) For the purposes of subdivisions (a) and (b) of this section, a transfer of property other than real

property shall be deemed to be made by or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee."

Oregon Revised Statutes, Section 86.420 provides as follows:

"WHEN MORTGAGE VOID AS AGAINST SUBSEQUENT PURCHASERS OR ENCUMBRANCES; DURATION OF LIEN; AFFIDAVIT OF RENEWAL: (1) Every mortgage, deed of trust, conveyance or instrument intended as a mortgage of personal property either alone or with real property, which is not accompanied by immediate delivery and followed by the actual and continual change of possession of the personal property mortgaged, or which is not recorded or filed as provided in O.R.S. 86.350 and 86.370, shall be void as against subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property or any portion thereof."

Oregon Revised Statutes 29.150 provides as follows:

"PLAINTIFF DEEMED PURCHASER IN GOOD FAITH: From the date of the attachment, until it is discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property attached, subject to the conditions prescribed in O.R.S. 29.190 as to real property."

Section 70c of the Bankruptcy Act, 11 U.S.C.A. Sec. 110 provides in part as follows:

"The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of

> such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

Therefore, since the Trustee is, by virtue of Section 70c, in the position of an attaching creditor, and by virtue of Oregon law an attaching creditor is in the position of a purchaser in good faith and for a valuable consideration, then in Oregon a Trustee is in the position of a purchaser in good faith and for a valuable consideration, and the District Court in Oregon has so held (see In re Chappell, supra).

From the above quoted statutes, it follows that as against the Trustee an unrecorded chattel mortgage is void.

However, numerous Oregon cases have held that the taking of possession by the mortgagee has the effect of perfecting the mortgage and is a substitute for recording.

In First National Bank of Burns v. Frazier, 143 Or. 662, 688, 19 P.2d 1091, 22 P.2d 325 (1933), the matter is stated as follows on page 688, 333:

> "10. In the case of Kenney v. Hurlburt, 88 Or. 688 (172 P. 490, 173 P. 158, Ann. Cas. 1918E, 737, L.R.A. 1918E, 652), it is stated that where the mortgage was upon a fluctuating stock of goods the lien became perfected when the mortgagee was put in possession of the merchandise, and that the mortgage operated as an executory agreement, which subjected the after-acquired goods to the lien of the mortgage upon the mortgagee's taking possession of the same.
>
> "It is contended, however, by the appellant here,

that this statement by the court was not material to the decision in the case and therefore is not controlling here. This court has re-examined the many authorities cited in the opinion in support of the foregoing statement and is satisfied that the proposition of law therein stated is sound. See in this connection, First National Bank v. Wegener, 94 Or. 318 (186 P. 41), Wiggins Co., Inc. v. McMinnville Motor Car Co., 111 Or. 123 (225 P. 314), and Ruth v. Cox, 134 Or. 200 (291 P. 371)."

In the instant case, appellees received actual possession on July 1, 1957, and received constructive possession by virtue of the stipulation and the decree, and so on that date appellees perfected their mortgage as against the Trustee.

This then is the date referred to in Section 60a (2) and, therefore, is the date of transfer within the meaning of the preference sections of the Bankruptcy Act, and, therefore, unless the State Court proceeding has the effect which was attributed to it by the District Judge, then a perference resulted on July 1, 1957 as all other elements of the preference were conceded by appellees.

SPECIFICATION OF ERROR NO. 2

The Court erred in finding as a matter of fact and concluding as a matter of law that the decree of the Circuit Court for Douglas County, Oregon, dated July 1, 1957, was res judicata and conclusive of the rights of the Trustee in this preference suit and was an enforcement of a valid pre-existing contractual right and not a lien obtained by a judgment within the definition of Section

67 of the Bankruptcy Act and that, therefore, appellees did not obtain a preference when they received the after-acquired merchandise.

ARGUMENT POINT 3

The legal effect of the State Court decree was to effect a foreclosure of an unrecorded chattel mortgage.

Davis v. Wood, 200 Or. 602, 268 P.2d 371 (1954).

As we have noted hereinabove under Point 1, it is the law in Oregon, as well as general law, that a conditional sales contract as to third parties and as to after-acquired merchandise, is in legal effect an unrecorded chattel mortgage.

Therefore, at the commencement of the State Court proceeding, we find the parties in the position of mortgagor and mortgagee.

It may be noted that the decree in the State Court proceeding was based upon a stipulation of the parties and not upon an actual trial and so, in fact, no findings were made by the Trial Court, but the complaint (Tr. 3) is labeled "Complaint in Equity" and contains the allegations of a foreclosure complaint, and said State Court did not have to determine more than that, as between the parties, the appellees were entitled to said merchandise as security as stated in Davis v. Wood, Supra.

ARGUMENT POINT 4

Said State Court decree is not res judicata of the rights of the Trustee in this preference suit.

Lawlor v. National Screen Service Corporation, 349 U.S. 322, 326, 75 S. Ct. 865, 99 L. Ed. 1122, 1126 (1955).

30A Am. Jur. JUDGMENTS, Section 399, page 451 (Ed. 1958).

Bankruptcy Act, Sections 60, 67 and 70, 11 U.S.C.A. 96, 107, 110.

Yale Law Journal, Volume 68, number 1, November 1958 (reprinted in Journal of the National Association of Referees in Bankruptcy, Volume 33, issues published in April and July, 1959).

Meier & Frank Co. v. Sabin, 214 Fed. 231, 233.

Jacobs v. Jacobs, 92 Or. 255, 260, 180 P. 515, 516 (1919).

Saper v. Long, 121 F. Supp. 65 (D.C.N.Y. 1954).

United States of America v. International Building Company, 345 U.S. 502, 73 S. Ct. 807, 97 L. Ed. 1182 (1953).

Annotation, 2 ALR 2d 514, 551 (1948).

Clark v. Mutual Lumber Co., 206 F.2d 643 (5th Cir. 1953).

Stark v. Baltimore Soda Fountain Mfg. Co., 101 F. Supp. 842 (D.C. Md. 1952).

Covey v. American Distilling Co., 132 F.2d 453 (7th Cir. 1943).

In re Mercury Engineering Company, Inc., 68 F. Supp. 376 (D.C. Cal 1946).

Eyster v. Gaff, 91 U.S. 521, 23 L. Ed. 403 (1876).

Linstroth Wagon Co. v. Ballew, 149 F. 960 (5th Cir. 1907).

In re Winter, 17 F.2d 153 (D.C. Mich. 1927).

Heiser v. Woodruff, 327 U.S. 726, 90 L. Ed. 971 (1946).

Zamore v. Goldblatt, 194 F.2d 933 (1952).

Berara v. City Real Estate Company, 64 F.2d 498 (2d Cir. 1933).

Sanford v. Boland, 287 N.Y. 431, 40 N.E. 2d 239, 241 (Ct. App. N.Y. 1942).

The doctrine of res judicata has been much defined, but was defined by the United States Supreme Court in Lawlor v. National Screen Service Corporation, 349 U.S. 322, 326, 75 S. Ct. 865, 99 L. Ed. 1122, 1126 (1955), as follows:

> "Thus under the doctrine of res judicata a judgment, 'on the merits' in a prior suit involving the same parties, or their privies, bars a second suit based on the same cause of action."

Thus in order to successfully bar the Trustee in the instant proceeding, by virtue of the doctrine of res judicata, appellees must show that the Trustee is the same party as the bankrupts, or in privity with them, and that the cause of action in the instant case is the same cause of action as was involved in the State Court proceeding.

Obviously the Trustee in bankruptcy, a person who came into being after termination of the State Court proceeding, in the capacity of representative of the creditors, cannot be the same party; so appellees must rely upon the contention that the Trustee is in privity with the bankrupt. The author in Volume 30A Am. Jur., JUDGMENTS, Section 399, page 451, states as follows:

> "Who are privies requires careful examination into the circumstances of each case as it arises. In general, it may be said that such privity involves a person so identified in interest with another that he represents the same legal right. It has been declared that privity within the meaning of the doctrine of res judicata is privity as it exists in relationship to the subject matter of the litigation, and that the rule

> is to be construed strictly to mean parties claiming under the same title. Under this rule, privity denotes mutual or successive relationship to the same right or property, so that a privy is one who, after the commencement of the action, has acquired an interest in the subject matter affected by the judgment, through or under one of the parties, as by inheritance, succession, purchase or assignment."

To put it succinctly, a privy is one who stands in the shoes of his predecessor.

It is believed by the writer that much of the confusion which surrounds the doctrine of res judicata, as applied to a Trustee in bankruptcy, arises out of a failure to distinguish between the Trustee in his capacity under Section 70a of the Bankruptcy Act, as an assignee of the rights of the bankrupt and successor to the interests of the bankrupt in and to the property of the bankrupt, and the Trustee's other capacity under the avoidance sections of the Bankruptcy Act, namely Sections 60 (preferences), 67 (judicial liens), and 70c (strong arm clause), which give to the Trustee rights and title not possessed by the bankrupt.

So long as the Trustee appears in his capacity derived under Section 70a of the Bankruptcy Act, the writer believes that the Trustee is in privity with the bankrupt, because under said section he has no higher rights, or other and different rights than did the bankrupt.

However, Congress was not content to leave the Trustee in the capacity of a mere successor to the rights of the bankrupt, and therefore added Sections 60, 67 and

70c, all of which gave the Trustee the capacity of a lien creditor, with an attachment or execution, which, of course, is a vastly different capacity from that of the bankrupt himself, and it appears to the writer that on logic, when the Trustee appears in the capacity of the ideal creditor holding a lien by equitable or legal proceedings, he is not then in privity with the bankrupt.

Professor James W. Moore, Editor in Chief of the 14th Edition of Collier on Bankruptcy, considered the matter in an article entitled Res Judicata and Collateral Estoppel in Bankruptcy, published in Yale Law Journal, Volume 68, number 1, November 1958, and reprinted in the Journal of the National Association of Referees in Bankruptcy in Volume 33, in the issues published in April and July 1959, and in said article states as follows:

> "In summary, then, since under Section 70a of the Bankruptcy Act, the trustee succeeds to the bankrupts property, the trustee is properly in privity of estate with the bankrupt as to that property at the time of bankruptcy. Generally, also, the trustee is so far in privity with the bankrupt that in personam judgments rendered prior to bankruptcy against the bankrupt and in favor of creditors are binding upon the trustee. In considering these general propositions, however, one must remember that the Bankruptcy Act empowers the trustee, under certain circumstances, to avoid judicial liens and preferential, fraudulent, and other proscribed transfers, for the benefit of the unsecured creditors he represents. And, further, judgments obtained against the bankrupt by fraud or collusion may not be binding upon the creditors' representative, their trustee. Thus, the idea of the trustee's privity with the bankrupt will not be pushed to the point that the estate is bound by judgments that would defeat the proper and just objectives of the Bankruptcy

Act. Subject to these qualifications, the general principles of privity are applicable in bankruptcy."

Professor Moore also states as follows:

"This procedure would not violate the doctrine that an issue which has been fairly adjudged is closed to relitigation, since there is incomplete privity between bankrupt and the trustee. The latter not only takes the bankrupt's estate but also represents creditors; thus, a judgment, though binding upon the bankrupt, is not always conclusive upon the creditors or their trustee."

The Ninth Circuit in Meier & Frank Co. v. Sabin, 214 Fed. 231 at page 233 recognized that the Trustee occupied a status entirely different from that of the bankrupt when it stated as follows:

"It is possible that the bankrupt might not be permitted to make this objection if it were shown that the bankrupt had received the goods and had identified them by taking them into possession. But the Trustee in bankruptcy, standing in the shoes of the bankrupt, with all the rights, remedies and powers of a lien creditor with respect to all property in the custody of the bankrupt Court occupies a different position."

It appears to the writer that the Trustee proceeding under the avoidance sections of the Bankruptcy Act, is not thus in privity with the bankrupt within the meaning of the doctrine of res judicata.

The second important matter involved is whether or not the cause of action in the instant case is the same as the cause of action in the State Court proceeding.

As previously shown, the action in the State Court

proceeding was between the parties to the contract and was an action simply and solely on behalf of the appellees to recover from the bankrupts the property by reason of default of the bankrupts under said contract. In the instant proceeding the Trustee is not endeavoring to recover said property by reason of the fact that the bankrupt was not in default, or by reason of the fact that the appellees were not entitled to the property as against said bankrupt, but the instant cause of action arises out of Section 60 of the Bankruptcy Act, and the instant cause of action is based upon the fact that appellees in said State Court proceeding were entitled to receive said property. The instant cause of action did not even arise until after the termination of the State Court proceeding, and upon the date of the commencement of the bankruptcy proceeding, and therefore it seems clear that the cause of action is not the same.

The Oregon Supreme Court in Jacobs v. Jacobs, 92 Or. 255, 260, 180 Pac. 515, 516 (1919), stated:

> "If the same evidence would sustain both, the two actions are considered the same, and the judgment in the former is a bar to the subsequent action, although the two actions are different in form. If, however, different proofs would be required to sustain the two actions, a judgment in one is no bar to the other. It has been said that this method is the best and most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties, and it has even been designated as infallible."

The only defense available to the bankrupt in the State Court proceeding was that he was not in default, and that he had made the proper payments, or that he

did not owe the money, whereas in the instant proceeding, the Trustee must show that in fact the bankrupt did owe money to the appellees and that appellees were entitled to recover the property under the contract, and Trustee must show the other elements of preference required by Section 60; the proofs in the two actions are entirely different, and the causes of action are not the same.

The Court in Saper v. Long, 121 F. Supp. 65 (D.C. N.Y. 1954), in a case in which the Trustee was suing for recovery of a preference following an earlier State Court proceeding, and in which the defendants defended on the ground of res judicata, held that the actions were different, and said on page 66 "Cause of action under the Bankruptcy Act were not adjudicated. Thus, we deal here not with the doctrine of res judicata, but with an aspect of it—collateral estoppel."

By reason of the fact that the causes of action are different, and that the parties are different, res judicata is not involved in this proceeding, and the Court's decision below can only be sustained, if at all, upon the doctrine of collateral estoppel.

The United States Supreme Court in the United States of America v. International Building Company, 345 U.S. 502, 97 L. Ed. 1182, 73 S. Ct. 807 (1953), differentiates between res judicata and collateral estoppel at 504 as follows:

> "A judgment is an absolute bar to a subsequent action on the same claim.
>
> "But where the second action between the same parties is upon a different claim or demand, the

> judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question *actually litigated and determined in the original action, not what might have been thus litigated and determined.* Only upon such matters is the judgment conclusive in another action." (Emphasis supplied)

It should be noted that the doctrine of collateral estoppel applies only in the second action as between the same parties, or their privies, and therefore unless this Court is satisfied that the Trustee in bankruptcy, in his capacity under Section 60 of the Bankruptcy Act, is in privity with the bankrupt, the judgment of the District Court is erroneous.

However, if this Court should conclude that the law is that the Trustee is in privity with the bankrupt even under the avoidance sections of the Act, then it is necessary for appellees to establish that the matter which is the subject of litigation in this proceeding, was previously litigated and determined.

The appellees contended in the District Court proceeding that the appellees "owned" or had legal title to the after-aquired merchandise, and that therefore the Trustee in the instant proceeding is bound by such determination and cannot establish a preference in this proceeding by showing that appellees did not have title to the after-acquired merchandise but rather were lienors

thereof under an instrument in the nature of an unrecorded chattel mortgage, and the District Court adopted this argument as its conclusion.

In the State Court proceeding, however, no trial was held but rather judgment was entered based upon stipulation of the parties (Ex. 4) and decree was entered without findings (Ex. 5).

Therefore, appellees cannot bring themselves within the rule stated by the U. S. Supreme Court in U. S. of A. v. International Building Company, Supra, in that the question of title was not actually litigated or determined.

In fact, it appears to be a general rule that although a consent or stipulated judgment is res judicata in a subsequent action between the same parties upon the same cause of action, nevertheless such a judgment has no effect by way of collateral estoppel in a subsequent action. The United States Supreme Court stated this rule in Lawlor v. National Screen Service Corp., supra.

> "No question of collateral estoppel by the former judgment is involved because the case was never tried and there was not therefore such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter."

Also see annotation "Consent Judgment as Res Judicata," 2 A.L.R. 2d 514, 551 (1948) where the author stated:

> "Most courts, however, apply to consent judgments the general rule that a former judgment does not operate as estoppel in a subsequent suit upon a different cause of action as to such matters as were not actually or necessarily determined in the former litigation, such as a counterclaim which

might have been, but, in fact, was not interposed therein. This rule is particularly applicable to judgments entered by consent in favor of the plaintiff because the defendant might have submitted either to avoid litigation or because he thought it not worth his while to try the question."

In the State Court proceeding, even had a trial been held, it would not have been necessary to try the question of title as between the parties but this Court is being asked to speculate further that even in the absence of a trial such a determination was made.

The District Court cited in support of its holding in the Court below, the following cases:

Clark v. Mutual Lumber Co., 206 F.2d 643 (5th Cir. 1953).

Stark v. Baltimore Soda Fountain Mfg. Co., 101 F. Supp. 842 (D.C. Md. 1952).

Covey v. American Distilling Co., 132 F.2d 453 (7th Cir. 1943).

In re Mercury Engineering Company, Inc., 68 F. Supp. 376 (D.C. Cal. 1946).

The Clark case may be distinguished from the instant case in that the decree was not entered in the State Court until twenty days after the adjudication in bankruptcy, whereas in the instant case the decree was entered prior to the adjudication in bankruptcy. The Court made a point of the fact that no attempt had been made by the Trustee to intervene in the State Court proceedings. When met with the argument that probably there was not yet a Trustee in existence at the time, the Court said that this was not to be presumed as the record before the Court did not show when a Trustee became qualified. Furthermore, the Court said

that since the State Court had retained jurisdiction over the foreclosure sale and confirmation of same, presumably intervention would have been entertained by the State Court up to time of entry of confirmation of sale. It is therefore apparent in the Clark case that the Court felt that the Trustee was entitled to his day in Court, and could have it. There is no similar situation in the instant case.

Furthermore, in the Clark case the Court was influenced by the fact that the case brought by the Trustee involved not only recovery of a preference, but determination of the fact whether the bankrupt had an interest in property acquired in the name of third persons. The Court stated at page 647 as follows:

> "It is clear that upon his election as Trustee in bankruptcy, appellant herein became vested with title only to such property as belonged to the bankrupt at the time of the commencement of bankruptcy proceedings, and has no right to have set aside the transfer of property such as that herein involved, which did not, according to the decree of the State Court, belong to the bankrupt."

It is submitted that the Court in the Clark case nevertheless erred in its conclusions upon the facts of that case. It is quite clear that the language above quoted from the Court's opinion states the applicable law under Section 70a of the Bankruptcy Act, where the Trustee seeks to recover in the right of the bankrupt and has nothing to do with the avoidance sections. Had the Trustee been seeking to recover the property under Section 70a, the Court in the Clark case would have been correct, but since the Trustee was in fact

pursuing the property in a preference suit, no res judicata was involved, but rather the doctrine of collateral estoppel and the Trustee was not bound by any finding of title in the State Court proceedings.

The fact that the Court erred in its conclusion is indicated by its reliance upon the case of Eyster v. Gaff, 91 U.S. 521, 23 L. Ed. 403, a case decided by the United States Supreme Court in 1876. The Trustee in the Eyster case relied solely upon the proposition that the adjudication in bankruptcy automatically ousted the State Court of any jurisdiction to proceed in the case, and the Trustee felt that even after the State Court decree, he could impeach that decree by putting forth the same defenses as were put forth in the State Court proceeding by the bankrupt. This, of course, is not so, and the doctrine of res judicata applies, and was no authority against the proposition asserted by the Trustee in the Clark case.

In the other three cases cited by the District Court herein, anything stated by said Courts on the subject matter was pure dictum. In the case of Stark v. Baltimore Soda Fountain Mfg. Co. the holding of the Court was "that the statute of limitations had run against the trustee" and in this the Court was correct. Furthermore, the Court felt that the Trustee should have intervened in the State Court proceeding which was still pending on the date of bankruptcy, and rejected his excuses for failure to do so.

The Court in the Stark case said "the Trustee in this case, having succeeded to the situation of the bankrupt,

is bound by the adverse State judgment, and cited Linstroth Wagon Co. v. Ballew, 149 Fed. 960 (5th Cir. 1907) and In re Winter, 17 F.2d 153 (D.C. Mich 1927). Like the Court in the Clark case, the Court in the Stark case is quoting language applicable to Section 70a, and the Linstroth Wagon case was decided before the avoidance sections, and the Court in In re Winter specifically stated in that case that the Trustee did not claim that the judgment was fraudulent or preferential, and indicated that its opinion would have been otherwise had that been the case.

All of the other citations in the Stark case are applicable to 70a citations and not to preference cases. Even Collier was cited, and the actual opinion of the author of Collier upon this subject matter has been cited hereinabove.

In Covey v. American Distilling Co., Supra, the facts were unusual in that it appeared that there was only one creditor in the bankruptcy proceeding. This creditor had previously brought a proceeding in the nature of a creditor's bill to litigate the precise question which was subsequently attempted to be litigated by the Trustee, namely the validity of a contract. The actual holding of the Court was that the contract was valid, and not that it was res judicata in the second proceeding, however, the Court did so state, but it must be remembered that this was not a preference situation.

In In re Mercury Engineering, Inc., Supra, the holding of the Court was that in fact the mortgage was not invalid under California law, and it was not a proceeding

under the preference sections, and could not have been because more than four months had elapsed. Insofar as the State Court Proceeding determined the amount of the creditor's claim, and this was the principal issue involved, the case is correct. Apparently the Court was bothered by this decision as the footnote sets forth cases attempting to show that creditors could have intervened in the State Court proceeding to protect themselves.

The Court cites and quotes from Heiser v. Woodruff, 327 U.S. 726, 90 L. Ed. 971 (1946). This case does not support the Court's conclusion for in that case, not only had the bankrupt appeared in the State Court proceeding and litigated his matter, but so also had the Trustee, as noted by the United States Supreme Court.

On the other hand there is very respectable authority for the proposition that a State Court decree in a foreclosure suit does not bind the Trustee in a subsequent preference suit brought under the avoidance sections of the Bankruptcy Act.

In Zamore v. Goldblatt, 194 F.2d 933 (1952), the Second Circuit so held. A suit to foreclose a chattel mortgage was commenced on November 3, 1949, and judgment rendered on December 29, 1949, adjudging possession and title in the mortgagor. On February 23, 1950, involuntary petition was filed against the mortgagor, and on June 22, 1950, the Trustee took possession and brought proceedings to sell the property free and clear of liens, and contended that said mortgage

was invalid, whereas the mortgagee defended on the ground that the title to, and possession of the chattels were in him by virtue of the judgment, which judgment was res judicata. The Court stated on page 934, as follows:

> "Moreover, the judgment in favor of Goldblatt in the N. Y. State Court action was not res judicata as against the Trustee. It was based on a mortgage that was properly held bad for lack of prompt filing and could not bind creditors or the Trustee in bankruptcy who stands in their shoes. The delay of twenty-nine days in filing was inadequately explained or excused and rendered the mortgage bad as against creditors."

In the case of Saper v. Long, 121 F. Supp. 65 (D.C. N.Y. 1954), the Court held that a prior mortgage foreclosure suit was not res judicata against the Trustee in a subsequent preference suit.

In Berara v. City Real Estate Company, 64 F.2d 498 (2d Cir. 1933) which was an action brought by the Trustee under Section 70e of the Bankruptcy Act, the Court held that the Trustee was not bound by the prior foreclosure suit in the State Court proceeding, and stated as follows:

> "A judgment in foreclosure in the State Court will not determine the issues in the present suit, for the issues involved here have not been tendered in the State Court action, nor have the Trustees in Bankruptcy been made parties thereto. Their rights, if established, are superior to those of the defendants, and of the Realty Construction Corporation, which is charged with having created a mortgage lien in fraud with creditors."

In Sanford v. Boland, 287 N.Y. 431, 40 N.E. 2d 239 (Ct. App. N.Y. 1942), a case sometimes cited for the proposition that a prior foreclosure suit is res judicata in a subsequent preference suit actually decided that since there was no evidence of a preference, the matter was res judicata, and on page 241 stated:

> "Only as to unlawful preferences and property fradulently conveyed has the Trustee any rights, in the interest of creditors, beyond those which the bankrupt itself could have enforced."

Also, Professor Moore in his said article on res judicata and collateral estoppel, states as follows:

> "Somewhat different principles are involved whenever the post-bankruptcy judgment is in rem. If an in rem suit commenced prior to bankruptcy or reorganization is not stayed, the in rem judgment binds the bankrupt's or debtor's estate whether or not the Trustee has become a party to the action. To this extent, the Trustee is treated as any other person succeeding to an interest in property pending litigation. But the judgment does not preclude the Trustee from suing either the plaintiff of the in rem suit or some other appropriate person to recover property pursuant to the avoidance sections of the Bankruptcy Act dealing with preferential, fraudulent and other voidable transfers. Moreover, under the better view, an in personam deficiency decree rendered after bankruptcy in the in rem suit does not so bind the Trustee unless he became a party to the action."

ARGUMENT POINT 5

Said State Court decree determined only that said Dickies were entitled to possession of said merchandise as against the bankrupts, and made no determination that said Dickies held title to said merchandise as against third party creditors, including the Trustee in Bankruptcy.

Masterson v. Pacific L. S. Co., 144 Or. 396, 404, 24 P.2d 1046, 1049 (1933).
30A Am. Jur., JUDGMENTS, Section 466, page 506 (Ed. 1958).
Saper v. Long, 121 F. Supp. 65, 66 (D.C. N.Y. 1954).

The only parties in said State Court proceeding were the original parties to the instrument.

In fact no answer or other pleading was ever filed in said State Court proceeding by the bankrupts, but had a pleading been filed, the only defenses open to the bankrupts were that defendants were not in default or that defendants did not owe the money.

Until the subsequent adjudication in bankruptcy no cause of suit for unlawful preference existed because said suit arises out of the Bankruptcy Act and flows only to a Trustee in bankruptcy, and there is no such proceeding authorized under the law of the State of Oregon.

It is, therefore, obvious that said State Court in said State Court proceeding could not determine matters with respect to third party creditors or a Trustee in bankruptcy who were not parties to the proceeding.

The Oregon Court in Masterson v. Pacific L. S. Co., 144 Or. 396, 404, 24 P.2d 1046, 1049 (1933), stated as follows:

> "A Decree is not and cannot be considered as operating as an estoppel as to facts which did not occur or rights which did not accrue until after the particular judgment was rendered and which were not involved in the suit in which it was rendered. A decree is not conclusive upon any point or question which from the nature of the case, the form of the action, or the character of the pleadings could not have been adjudicated in the suit in which it was rendered; nor as to any matter which must necessarily have been excluded from consideration in the case as being beyond the jurisdiction of the particular court. 34 C.J. 932, et seq. 1338, 1339; Hunter v. Roseburg, 30 Or. 588 (156 P. 267, 157 P. 1065)."

Therefore, it appears that the Court was not asked to determine rights of third party creditors or those of the Trustee in bankruptcy, nor could the Court in the circumstances have done so.

If the appellees desire to rely upon the doctrine of collateral estoppel, the burden is on them to prove that title was determined in the State Court proceeding.

In Am. Jur., Vol. 30A, Section 466, page 506, the author states:

> "The general rule is that a person relying upon the doctrine of res judicata as to a particular issue involved in the pending case bears the burden of introducing evidence to prove that such issue was involved and actually determined in the prior action, where this does not appear from the record. Under this view, it must clearly appear from the record in the former cause, or by proof by competent evidence consistent therewith, that the matter as to which the rule of res judicata is invoked as a bar was, in fact, necessarily adjudicated in the former action. It is said that the defense of res judicata

> through estoppel is to be allowed with caution, and it must rest upon a more solid basis than mere speculation as to what was actually adjudicated in the prior action. Proof of identity of issues must be estabilshed by a preponderance of the evidence, and there can be no estoppel where there is a reasonable doubt whether a fact was actually adjudicated."

The Court in Saper v. Long, 121 F. Supp. 65, at page 66 stated that the burden is on him claiming under collateral estoppel to distinctly show that the precise matter was put in issue in the State Court proceeding, and that a decision on that issue was necessary to the resolution of the conflict before the Court, thus the burden is on appellees in this proceeding to prove that title to the merchandise was in issue in the State Court proceeding and that such issue was necessary to the State Court's decision. This the appellees have not done, and cannot do.

SPECIFICATION OF ERROR NO. 3

The Court erred in failing to find that on July 1, 1957 said bankrupts, individually and as copartners, were insolvent, and that appellees had reasonable cause to believe they were so insolvent and that the transfer was a transfer of bankrupts' property in payment of an antecedent debt, namely the unpaid purchase price under the contract dated April 11, 1955 and that said transfer resulted in appellees' receipt of a greater portion of their debt than other creditors in the same class.

SPECIFICATION OF ERROR NO. 4

The Court erred in failing to find that the transfer of said merchandise on July 1, 1957 resulted in a preference voidable under Section 60 of the Bankruptcy Act.

SPECIFICATION OF ERROR NO. 5

The Court erred in failing to legally conclude that appellant was entitled to judgment against appellees, and each of them, in the sum of $14,986.17 with interest at six per cent per annum from October 4, 1957 until paid.

ARGUMENT POINT 6

Said Dickies, having consented to the commingling of the merchandise sold by them to the bankrupts, have the burden of pointing out the merchandise in the commingled mass which they sold.

In re Thompson, 164 Iowa 20, 145 N.W. 76 (1914).
Jones on Chattel Mortgages and Conditional Sales Contracts, Volume 1, Section 155 (Bowers Ed. 1933).
Jones on Chattel Mortgages, Section 483.
Thomas Roberts and Co. v. Robinson, 141 Md. 37, 118 A 198 (1922).

In discussing the foregoing points, the writer has assumed that all merchandise on hand at the time appellees acquired possession thereof, after the State Court proceeding, was "after-acquired" merchandise.

The bankrupts acquired the store and merchandise from appellees on or about April 11, 1955 and operated

same until on or about July 1, 1957 (Tr. 26, 28). During said period of time the bankrupts purchased and sold merchandise as follows:

	Purchases (These figures do not include the purchase of the original inventory.)	*Sales*
1955	$45,151.30	$56,366.85
1956	49,005.99	65,920.27
1957	10,970.95	14,289.76
Totals	$105,128.24	$136,576.88

The appellees were unable at the trial to testify as to the amount of merchandise, if any, on hand on July 1, 1957 which was the identical merchandise sold by them to bankrupts in April of 1955 (Tr. 89-90), although appellees went into possession on July 1, 1957 and continued in possession thereafter and, therefore, had the opportunity to examine and inventory the merchandise then on hand.

One of the bankrupts, Wanda Branch, testified that approximately one half of the original merchandise was still on hand on July 1, 1957 (Tr. 63) and the Court so found (Tr. 99).

But such testimony is, of course, at best, guesswork, and the law has placed the burden on one seeking to secure merchandise from a commingled mass to point out said merchandise if he allowed the commingling.

The Court in In re Thompson, 164 Iowa 20, 145 N.W. 76 (1914) stated:

> "In Jones on Chattel Mortgages, section 483, it is said: 'Where the confusion of the goods has taken place by the permissive act of the mortgagee, he is

not allowed to defeat the rights of the judgment creditor by claiming the goods under his mortgage. If, under such a mortgage, the mortgagee has permitted sale to be made by the mortgagor, and the latter afterwards makes an assignment for the benefit of creditors, and the assignee sells the goods, the mortgagee is entitled to only such part of the proceeds as come from (29) the sale of the goods embraced in the mortgage, and the burden is on him to show what goods, sold by the assignee, were subject to the mortgage lien. If he has allowed the goods mortgaged to be so intermingled with goods afterwards purchased as to prevent the ascertainment of those on hand when the mortgage was given, he must suffer the loss'—citing authorities.
* * *

"Where, however, the intermixture is innocent, or by mistake, or even negligently done, where there is no willful fraud involved, the party causing the confusion would not lose his property, but he does not gain anything by it, and will be required, in order to protect himself, to point out and designate his property, or he loses the whole to the party with whose it is intermingled."

Also in Jones on Chattel Mortgages and Conditional Sales Contracts, Bowers Ed., Vol. 1, Sec. 155 (1933), the author states:

"When subsequently-acquired goods have been commingled with a mortgaged stock, the burden is upon the mortgagee, in a suit at law, to recover the mortgaged goods or their valuation to show that the goods he claims were on the premises or belonged to the mortgagor at the date of the mortgage. Citing Ilfeld v. Ziegler, 40 Colo. 401, 91 P. 825, and other cases."

The writer further states:

"Moreover, if the mortgage in terms covers goods afterwards to be acquired, the commingling of the

mortgaged property with that subsequently acquired is presumed to have occurred with the mortgagee's permission; and if they have been so intermixed as to prevent their separation or identification, the rights of third parties purchasing or levying upon the goods cannot be affected, citing Hamilton v. Rogers, 8 Md. 301."

In Thomas Roberts and Co. v. Robinson, 141 Md. 37, 118 A. 198 (1922), the facts were as follows:

Seller sold cans to Packer, who filled same with produce. Seller's agreement gave him the right to recover not only the cans but also the contents. Seller replevied and the trustee intervened.

The Court said at p. 202:

"With respect to the contents of the cans replevied in the present case, the plaintiff's claim is not of a title reserved under a conditional sale, but of a lien on material bought from other persons. To that extent the plaintiffs are in the same position in regard to the bankrupt estate as if they were claiming under an unrecorded chattel mortgage or bill of sale."

P. 203:

"There is nothing in the evidence to exclude the theory that the cans in which these potatoes were packed may have been some of those which appellees did not supply. As to that carload we think the proof of identification is not legally sufficient. * * *

"The fact that the cans obtained by Keel (the packer) from the various sources were mingled in the course of their use in his packing business might have prevented him from raising the question now under consideration; but it does not, as against the rights of third persons, entitle the appellees to the possession of property which is not proved to be within the terms and description of the contract by which their claim is sought to be supported."

The agreement (Ex. 2) specifically authorized the bankrupts to sell the merchandise in the ordinary course of trade and to acquire new and additional merchandise and did not forbid any commingling and, therefore, they are subject to the above rules; and since they were unable to point out their own merchandise, it must be assumed that all of the merchandise which came into the hands of the Trustee was after-acquired.

ARGUMENT POINT 7

Said Dickies failed to point out their merchandise and, therefore, lost whatever lien, if any, they held against the merchandise originally sold.

In accordance with the rules cited under Point 6 above, since the Dickies could not point out their merchandise, whatver lien, if any, they held against the merchandise originally sold is now lost.

ARGUMENT POINT 8

The Trustee is entitled to judgment against the Dickies for the full amount of the merchandise received by them from the bankrupts, namely the sum of $14,786.17, with interest at six per cent per annum from October 4, 1957, until paid.

Bankruptcy Act, Section 60, 11 U.S.C.A., Section 96 and Section 60a (6).

3 Collier on Bankruptcy, Section 60.09 at page 786, Section 60.39 at page 912 (Ed. 14th, 1956).

Matter of Greenberg, 48 F. Supp. 3 (D.C. Mass 1942).

Matter of Markert, 45 F. Supp. 661 (D.C. Mass. (1942).

The elements of a preference are as follows:

1. A transfer by debtor of his property.
2. To a creditor.
3. For an antecedent debt.
4. A transfer must be at a time when the debtor is insolvent.
5. The transfer must be within four months prior to the commencement of a bankruptcy proceeding.
6. The transfer must enable the creditor to obtain a greater percentage of his debt than some other creditor of the same class.
7. A creditor must have had reasonable cause to believe that the debtor, at the time of said transfer, was insolvent.

As applied to the facts in this case, the first three elements of a preference depend upon whether the acquisition of possession through the decree of the State Court proceeding by the appellees constituted at that time a transfer of property from the bankrupts to appellees. Section 60a of the Bankruptcy Act, subsection (2), provides that as to personal property, a transfer shall take place at the time when the alleged transferee so perfects his rights that a subsequent attaching creditor could not acquire superior rights. We have seen that in Oregon the taking of possession is equivalent to recording and after recording, or taking of possession, a subsequent attaching creditor could not acquire rights superior to the mortgagee, but that prior to said taking of possession an attaching creditor would prevail as against the mortgagee. Furthermore, Section 60a (6)

provides unequivocally that if a recording or delivery of possession is necessary in order that the mortgagee can prevail against attaching creditors, then the transfer shall be deemed to have taken place not earlier than the date of said recording or delivery of possession.

Therefore, in the instant case, since the appellees had prior to July 1, 1957 only an unrecorded chattel mortgage, perfection within the meaning of Section 60 of the Bankruptcy Act took place upon their receipt of possession of the property on said date. See Collier on Bankruptcy 14 Ed., Vol. 3, Sec. 60.09, p. 786, and Sec. 60.39, p. 912; Matter of Greenberg, 48 F. Supp. 3 (D.C. Mass. 1942); Matter of Markert, 45 F. Supp. 661 (D.C. Mass. 1942).

Therefore, the transfer took place on July 1, 1957, but the debt for which said transfer was made arose on April 11, 1955 in accordance with the contract of sale (Ex. 2). The transfer on July 1, 1957 was, therefore, upon an antecedent debt so that the first three elements of a preference are satisfied.

Elements four and seven are admitted facts in this proceeding (Tr. 6 and 71).

Since we have concluded that the transfer took place on July 1, 1957 and since the bankruptcy proceeding commenced on July 10, 1957 (Tr. 4), the transfer was within four months thereof.

It was stipulated in the proceeding that on July 1, 1957 there was owing by the bankrupts to appellees the sum of $16,697.17 and that the value of the fix-

tures was the sum of $2,000.00 and, therefore, the indebtedness unpaid after recovery by appellees of the fixtures was $14,697.17 (Tr. 70) and the inventory of merchandise received by them was in the sum of $14,786.17 (Tr. 6). Since the Trustee has on hand the sum of $1,374.44 to pay costs of administration and priority claims in the amount of $3,273.32 (Tr. 28-29), it is obvious that unless this transaction is set aside, appellees will receive a greater percentage of their debt than other creditors, since other general creditors will receive nothing.

CONCLUSION

Therefore, all of the elements of a preference are present and appellant is, therefore, entitled to judgment against the appellees for the sum of $14,786.17 with interest at six per cent per annum from October 4, 1957, the date of plaintiff's demand (Tr. 6), until paid.

Respectfully submitted,

BOYRIE and MILLER,
F. BROCK MILLER.

No. 16504

United States
Court of Appeals
For the Ninth Circuit

FRANK A. DUDLEY, as Trustee of the Estate of Merle K. Branch and Wanda B. Branch, co-partners, doing business as Riddle General Store, Bankrupts,

Appellant,

vs.

CLIFFORD E. DICKIE, and MARIE E. DICKIE,

Appellees.

Brief of Appellees

Appeal from the United States District Court for the District of Oregon.

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WATSON PRINTING COMPANY - PORTLAND, OREGON

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WATSON PRINTING COMPANY - PORTLAND, OREGON

STATEMENT OF JURISDICTION

This suit arises under Section 60 (b) of the Bankruptcy Act and was brought in the United States District Court for the District of Oregon. Judgment was entered for appellees.

Jurisdiction of this court is based upon Title 11 U.S. C.A., Sec. 47.

STATEMENT OF THE CASE

This appeal involves a preference suit commenced under the provisions of Section 60 (11 U.S.C.A., Sec. 96), of the Acts of Congress relating to bankruptcy.

Appellees for many years prior to April 11, 1955, owned and operated the "Riddle General Store," at Riddle, Oregon, in which they were engaged in the retail sale of general merchandise.

On April 11, 1955, they executed with the bankrupts a contract, under the terms of which appellees agreed to sell and bankrupts agreed to buy all of the assets, including the fixtures and inventory of the Riddle General Store, for the sum of $30,000.00, which sum was to be paid $8000.00 at about the time of the execution of the contract, and the balance of $22,-000.00 would be paid in monthly installments of 5% of the gross income from the operation of the business, with a minimum of $300.00 in any one month.

In June, 1957, the bankrupts were in default under the terms of said contract, and appellees commenced a suit in the Circuit Court of the State of Oregon for the County of Douglas, to declare appellees the absolute owners of the property sold under said contract, and praying for a decree restoring to them all of the stock of merchandise, inventory and fixtures then located in the Riddle General Store, as well as the premises. A decree was duly entered by said Circuit Court on July 1, 1957, which included the following:

> "1. That plaintiffs are the sole owners of the furniture, fixtures and stock of merchandise located at the Riddle General Store free and clear of all liens, claims, rights, title and interest of the defendants, or either of them, and all persons claiming by, through or under them, with the exception of a certain stock of merchandise on consignment from the Ferry-Morse Seed Company and excepting also a hose rack which shall remain the property of defendants; and excepting a security claim of Commercial Credit Corporation in certain appliances now located in said store.
>
> 2. That plaintiffs are entitled to the immediate possession of the furniture, fixtures and stock of merchandise above described, subject to the above named exceptions, and the defendants are required to deliver the possession thereof to plaintiffs."

On July 1, 1957, appellees took possession and control of said store, and all of the furniture, fixtures and stock of merchandise, which inventory of merchandise

at said time, in accordance with a physical taking thereof, was of the value of $14,786.17. Thereafter, on July 11, 1957, the purchasers herein were duly adjudicated bankrupts in the United States District Court for the District of Oregon. Appellant is Trustee of the estate of said bankrupts.

SUMMARY OF ARGUMENT

Conditional sales of property are valid and do not require filing or recording under the Oregon law. Where the conditional sellers, in compliance with the contract, retook possession of their property prior to the time the conditional purchasers were declared bankrupts, and prior to election of trustee in bankruptcy, no preference was created.

Where state court adjudicated that conditional sellers are the sole owners of all the property, which adjudication was prior to time that conditional purchasers were declared bankrupt, and no proceedings were instituted to set aside the state court judgment, the same was res judicata and binding upon all persons, including appellant.

ANSWER TO SPECIFICATION OF ERROR NO. I.

The Validity of the Conditional Sales Contract Must be Determined by the Law of Oregon.

Other than a conditional sales contract relative to

personal property attached to real estate, **ORS 76.010,** there are no statutory requirements in Oregon for the recording or filing of conditional sales contracts. **Meier & Frank Co. v. Sabin,** 214 F. 231; **Maxson v. Ashland Iron Works,** 85 Or. 345, 166 P. 37.

Conditional sales contracts are valid under the law of Oregon. **Miles v. Sabin,** 90 Or. 129, 175 P. 863.

And, as stated in **Wickwire v. Hanson,** 133 Or. at page 88:

> ". . . It is the law of this state, that parties to a contract may agree upon its terms and in cases of conditional sales the courts will enforce the contract as agreed upon between the parties. . ."

The principal distinction between a conditional sale and a chattel mortgage must be borne in mind. Under a conditional sale the parties contemplate a sale of property with title remaining in the vendor until payment of the purchase price, the use and possession of the property being in the vendee with the further right on his part to acquire title upon performance of the terms and conditions of the contract.

In a chattel mortgage, the entire transaction is merely security for a debt, title and the right to the use and possession of the property remaining in the mortgagor, the mortgagee obtaining merely a lien upon the property as security. In Oregon, upon default, the mortgagee acquires a qualified title to the property.

Templeton v. Lloyd, 59 Or. 52, 115 P. 1068; **Commercial Securities v. Mast,** 145 Or. 394, 28 P. 2d 635.

Where property is sold under the condition that title is to remain in the vendor until payment of the price, possession and use being in the vendee, the vendor having the option upon default to repossess the property, the transaction is a conditional sales contract. **Lynch v. Sable-Oberteuffer-Peterson,** 122 Or. 597, 260 P. 222, 55 A.L.R. 180; **Francis v. Bohart,** 76 Or. 1, 147 P. 755; **Washburn v. Inter-Mountain Mining Co., et al,** 56 Or. 578, 109 P. 582; **McDaniel v. Chiarmonte,** 61 Or. 403, 122 P. 33.

In the instant case, the provisions of the contract on default gave appellees three options. They exercised their right to institute suit to take possession and to carry on the business. The state court adjudged appellees were the owners of the property and awarded possession.

Where a conditional vendor is entitled to repossess the property and does so before the institution of bankruptcy proceedings by the conditional purchaser, the conditional vendor will prevail as against a trustee in bankruptcy claiming a voidable preference. **Finance & Guaranty Co. v. Oppenheimer,** 276 U.S. 10, 72 L. ed. 443, 48 S. Ct. 209; **Jennings v. Schwartz,** 86 Wash. 202, 149 P. 947; **Hart v. Emmerson-Brantingham Co.,**

203 F. 60, 30 Am. Bank. Rep. 218; **Re Johnson,** 282 F. 273, 49 Am. Bank. Rep. 118.

Volume 3, Collier on Bankrupcy, 14th Edition, Par. 60.43, p. 942, Note 21:

"Wherever recording is not required to make the conditional sale good against a subsequent lien creditor of the vendee, the ensuing discussion as to perfection of transfer is not material. By the weight of authority the conditional vendor will prevail over a subsequent lien creditor of the vendee where recording has not been made a requisite. 1 Williston on Sales (2d ed. 1924) Sec. 324, 325; In re Lutz (D.C. Ark.) 28 Am. B.R. 649, 197 F. 492. Thus, so far as Section 60a is concerned, the preferential character of a conditional sale in such a case must be determined as of the date of execution of the transaction. This would seem to be true even where the contract gives the vendee the right of resale (see Bryant v. Swofford Bros. Dry Goods Co., infra, n. 21a). **Since the state law has not enunciated any policy that requires public notice of these transactions, the application of Section 60a can do no more. State statutes, however, should always be consulted for the latest legislative enactments."** (Emphasis added).

Appellant relies on **Davis v. Wood,** 200 Or. 602, 268 P. 2d 371, (App. Brief, p. 10) for the proposition that a conditional sales contract is not to be interpreted so as to allow the seller to claim it provides security on after acquired property. The only issue in that case was the question of whether the seller had wrongfully declared

a forfeiture of property being purchased under a conditional sales contract. The court concluded that the evidence was insufficient to show either an intentional abandonment of the property by the purchaser or any legally effective act of the sellers operating as a forfeiture of the property. There was involved not only a conditional sales contract but also a lease of real property. The court held that the additional property purchased and installed by the buyer became security for any sum which may be found to be due to the seller, but that it did not become the property of the seller when it was first purchased and installed.

It must be borne in mind that the court in the above cited case was sitting in equity to pass on the question of whether the seller had wrongfully declared a forfeiture. In order to do equity, the court, by obiter dictum, utilized a principle applicable to chattel mortgages. We have pointed out the particular differences between the legal effect of a conditional sales contract under which legal title is retained by the seller, as against a chattel mortgage, in which legal title rests with the mortgagor.

Appellant discounts the fact that the Oregon court in the instant case, entered a decree that appellees were the owners of all the property. This is not a case where declaratory relief is being requested as to the rights of parties, in futuro. When appellees were de-

clared by the Oregon court to be the owners, that became an accomplished fact, and the trustee is bound by such adjudication. (See Argument and authorities submitted herein in Answer to Specification of Error No. II.)

It should also be noted that in the **Davis v. Wood** case, cited by appellant, the conditional sales contract related to certain restaurant equipment and fixtures, and under the contract purchasers were required to purchase and install additional fixtures of approximately $2500.00, and the contract provided that "such additional personal property and fixtures shall be deemed and considered as a part of the seller's property which they are hereby selling under the contract to the buyer, etc." Unlike the contract in the instant matter, there is no sale of inventory involved, and no authorization of resale by the purchasers, and neither is there any specific provision in the contract for replacement of the merchandise that is sold by the purchasers. In the case at bar, the contract, inter alia, provided:

> ". . . (pages 2-3) It is agreed by and between the parties hereto that the value of the fixtures included in the above purchase price is the sum of $2,000.00 and that the value of the inventory of merchandise is the sum of $28,000.00 as of the 15th day of April, 1955.
>
> Purchasers agree that they will at all times keep up the inventory of said business to the full sum of $22,000.00, and will at all times keep said stock

of merchandise insured against loss by fire, damage by smoke or water, in the sum of $22,000.00. All policies of insurance to be so written as to set forth the interest of the Sellers and the Purchasers.

Notwithstanding the fact that the Purchasers shall have the right to sell merchandise from the stock on hand and continue to operate said business in a regular and general manner, the title to said fixtures and inventory shall in the event of default, as well as at all times herein mentioned, shall remain in the Sellers until the full balance of purchase price and interest as herein provided has been fully paid.

Purchasers agree that they will pay for all merchandise delivered to said business as the same is received to the end that all such merchandise shall become a part and parcel of the stock and inventory and the title immediately vested in the Sellers, subject only to right of the Purchasers as in this contract provided."

* * * *

(Page 6) "Notwithstanding anything to the contrary herein contained or any of the other obligations or rights of the parties hereto, Purchasers agree that they will, at least once each year, furnish to Sellers the complete inventory of the stock and merchandise then on hand. In the event said inventory shows that Purchasers are not maintaining the full amount of merchandise and stock as in this contract provided, then the Purchasers will forthwith increase the stock of merchandise to comply with the terms of this contract." (Emphasis added).

The foregoing excerpt from the contract specifically

provides that title to all after acquired property shall immediately vest in the sellers, and no such provision can be found in the case of **Davis v. Wood,** cited by appellant.

Kliks v. Courtemanche, 150 Or. 332, 43 P. 2d 913; **Caldwell Finance Co. v. McAllister,** 226 F2d 189, which approved the Kliks case, and **Hughbanks v. Gourley,** 12 Wash. 2d 44, 120 P. 2d 523, cited by appellant, but are not applicable to the facts in the instant matter. These cases involve money lenders who were attempting to secure themselves with a conditional sales contract in lieu of a chattel mortgage involving personal property which the conditional vendee never owned, and in which there was no provision for resale or agreement to replace or replenish any of the property.

Appellant contends that the conditional sales contract involved in the instant case should be construed to be comparable to an unrecorded chattel mortgage, and was not valid as against the trustee, and, further, that the conditional sales contract, lacking an acknowledgment, its recording was legally ineffective.

The recording of the conditional sales contract is immaterial to the issue in this case. The rights of the trustee (appellant) did not arise until after the adjudication of bankruptcy of the conditional purchasers. At that time, the property in question had already been adjudicated by the state court to belong to appellees.

When appellees repossessed themselves of their property they did what they had a lawful right to do as against the conditional purchasers and appellees simply took what was adjudicated belonged to them. At that time, no creditor had a judgment or other lien so far as the law of Oregon was concerned. **Finance & Guaranty Co. v. Oppenheimer,** supra.

And, as clearly stated, in **Jennings v. Swartz,** 86 Wash. 202, 149 P. 947.

> " . . . This court has many times held that, where contracts of this kind are void as between the vendor and creditors of the vendee, yet as between the vendor and the vendee such contracts are valid. . . And so in this case the conditional sales contract was clearly valid as between the original vendor and vendee; and when the vendor, in compliance with that contract, retook possession of the property prior to the time when any creditor obtained a specific lien thereon, and prior to the time the vendee was declared bankrupt, and prior to the time of the election of the trustee in bankruptcy, the vendor thereupon regained whatever interest he had in the property . . ."

In the above case, despite the fact that the conditional sale contract was void because not signed by the vendor, as the statute required, nonetheless, it was not necessary to pass upon the validity of the contract, as affected by creditors of the vendee, because the conditional sales contract was rescinded and possession

of the property was retaken by the vendor **before** any **right** or lien of creditors attached.

In the instant case, the conditional sale contract did not involve a loan of money by appellees to the conditional buyers. By the terms of the contract appellees made a bona-fide sale on credit, reserving title in themselves until the purchase price was fully paid. Hence, appellant's contention that it should be construed in the same light as that of a chattel mortgage, is untenable.

ANSWER TO SPECIFICATION OF ERROR NO II.

The decree of the state court is final as to ownership of the property and was rendered before adjudication in bankruptcy. The court had jurisdiction of the parties and competent power to render the decree.

If appellant desired to avoid the effect of and not be bound by that decree, it was his duty to apply to the Oregon court within one year from the entry of the decree to have it vacated to permit him to interpose a defense, if any. Not having made such application, the decree is final and conclusive.

The decree of the state court is res judicata and binding upon all persons, including appellant.

ARGUMENT

Prior to any bankruptcy proceedings, and on July 1, 1957, the Circuit Court of the State of Oregon for Douglas County, adjudged appellees to be the owners and restored to them all their right, title and interest in and to all the property now claimed by appellant. Such a decree was final and conclusive as to the title to the property.

The decree of the Circuit Court cannot now be collaterally attacked in this proceeding, except on the grounds of fraud, which has not been claimed or alleged by appellant. Such a decree must be given full faith and credit by the federal court in connection with all matters merged in said decree, which included a clear determination that appellees are entitled as absolute owners to all of the stock of merchandise, furniture and fixtures located in the Riddle General Store on July 1, 1957.

28 U.S.C.A., Sec. 1738.

"A judgment entered in a state court must be accorded full faith and credit in Federal District Court." **c. f. Treinies v. Sunshine Mining Co.,** 308 U.S. 66, 60 S. Ct. 44, 84 L. ed. 85, aff. 99 F. 2d 651 (9th); **American Surety Co. v. Baldwin,** 287 U.S. 156, 77 L. ed. 231, 53 S. Ct. 98.

The Circuit Court of Oregon having found that appellees are the absolute owners of all of the personal

property, including the inventory of merchandise located in the bankrupts' premises on July 1, 1957, any matters concerning whether the merchandise repossessed by the appellees was included in the stock of merchandise at the time of the execution of the conditional sales contract in April, 1955, or whether such merchandise was subsequently acquired by the bankrupts in replacement thereof, may not now be examined by another court.

> **ORS 43.130.** JUDICIAL ORDERS THAT ARE CONCLUSIVE. The effect of a judgment, decree or final order in an action, suit or proceeding before a court or judge of this state or of the United States, having jurisdiction is as follows:
>
> (1) In case of a judgment, decree or order against a specific thing or in respect to the probate of a will or the administration of the estate of a deceased person or in respect to the personal, political, or legal condition or relation of a particular person, the judgment, decree or order is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person.
>
> (2) In other cases, the judgment, decree or order is, in respect to the matter directly determined, conclusive between the parties, their representatives and their successors in interest by title subsequent to the commencement of the action, suit or proceeding, litigating for the same thing, under the same title and in the same capacity.

In **Harju v. Cox,** et al, 146 Or. 187, 29 P2d 364, it was held, that a decree declaring a decedent was the

legal owner of money paid to Administratrix of decedent's estate from proceeds of a judgment, was conclusive as to title to fund in County Court. The Court said:

> " . . . The moment the estate received Harju's money it became indebted to him in the sum of $1,000.00. It will be recalled that the circuit court, by its decree of January 5, 1929, 'ordered and decreed that the said defendant N. E. Harju is and hereby is decreed to be the legal owner and entitled to the said money, namely, the sum of $1,180.00,' and ordered its return to him . . .
>
> . . . In the instant case, the controversy between the administratrix and the claimant was settled in a suit instituted by her in a decree of the circuit court entered before the final report was filed . . .
>
> . . . After the entry of the circuit court's decree, it became the duty of the county court not to ignore nor to thwart the decree, but to carry it into effect so far as the writs, orders and other instrumentalities under its command permitted. The decree, by virtue of section 9-618 Oregon Code 1930, was conclusive in the county court as to the title of the fund. . . "

An authority apposite to the instant case is **Mercury Engineering,** 68 F. Supp. 376 (1946), where it was held, that an unappealed judgment rendered on stipulation and prior to adjudication of bankruptcy, in an action to foreclose a purchase price chattel mortgage covering machinery and equipment was res judicata between mortgagor and mortgagee, and was not subject to

relitigation by the mortgagor's bankruptcy trustee on behalf of creditors.

To the same effect is, **In re Coxes,** 105 F. Supp. 651, (1952), where a judgment of a state court in favor of a mortgagee in an action against the mortgagor and insurer to recover proceeds of a fire insurance policy, became final and no appeal was taken, the judgment was res judicata in bankruptcy proceedings wherein trustee sought proceeds of the fire insurance policy.

And in **Covey v. American Distilling Co.,** 132 F. 2d 453 (1943) (7), an order dismissing a judgment creditor's suit against a judgment debtor and distilling company to recover an amount paid by the debtor to the company on a contract of sale of whiskey, on the ground the contract was void., because debtor was not licensed to purchase the whiskey, was a 'final order' on the merits and was res judicata on the issue of the validity of the contract. The debtor's trustee in bankrupcy was denied the right to relitigate the validity of the contract.

In **Scott Publishing Co. v. Rodgers,** 229 F. 2d 956 (9th) (1956), this Court affirmed the principle of res judicata of a state court's determination that the trustee was entitled to the sum in controversy.

In **Stark v. Baltimore Soda Fountain Mfg. Co.,** 101 F. Supp. 842 (1952), it appeared that a replevin action

was brought in state court and judgment of restitution given for property involved. The replevin action was pending when the defendant was adjudged a bankrupt.

It was held that the judgment in the state court was res judicata in an action involving same property, and brought by trustee in bankruptcy claiming a preference, and even though trustee did not intervene in the replevin action. The court said, "The Trustee in this case having succeeded to the situation of the bankrupt is bound by the adverse state judgment."

Another authority directly in point with this case at bar is **Clark v. Mutual Lumber Co.,** 206 F 2d 643. The subject matter involved real estate. Dix and his wife owned the property and Dix was an officer of the Riverview Building & Supply Co., a corporation. He caused a building to be constructed on his property which was used by the Riverview Company. The corporation became financially involved and appellee was given a mortgage by Dix and his wife in the amount of the debt owing by the corporation. On January 4, 1951, a foreclosure suit was filed by appellee in state court, and a decree pro confesso was entered against all defendants. On January 31, 1951, an involuntary petition in bankruptcy was filed against Riverview, and it was adjudicated a bankrupt. There was no attempt by the bankrupt's trustee to intervene in the state proceedings,

and on February 21, 1951, the State Court entered its final decree of foreclosure.

The trustee claims the funds of the bankrupt were used in the purchase of the property and that the building which was thereafter constructed thereon was in possession of the bankrupt and was paid for in part with bankrupt's funds. That the mortgage given by Dix and his wife constituted a preference, etc.

A summary judgment was entered against the trustee. The court relied on **Eyster v. Gaff,** 91 U.S. 521, 23 L. ed. 403, where the principle of res judicata was applied. The court said:

> " . . . It is clear that, upon his election as trustee in bankruptcy, appellant herein became vested with title only to such property as belonged to the bankrupt at the time of the commencement of the proceedings, and has no right to have set aside the transfer of the property, such as here involved, **which did not according to the decree of the state court belong to the bankrupt. . . .**
>
> We conclude . . . that the judgment rendered in the state court had the effect of estopping the bankrupt and its trustee from asserting or maintaining any matter that might have been offered in that suit to defeat the claim asserted by the plaintiff therein, the present appellee . . ."

The District Court relied on the above cited case in its opinion rendering judgment in favor of appellees, and even though the state court judgment relied upon

therein was entered after bankruptcy—a situation more favorable to the appellant herein—the appellant in his brief at page 29 attempts to overcome the holding by stating, "It is submitted that the court in the Clark case nevertheless erred in its conclusion upon the facts of that case."

Avoiding Effect of Judgment of State Court.

If appellant desired to avoid the effect of and not be bound by the decree of the state court entered on July 1, 1957, it was his duty and he was empowered to apply to the Oregon court within one year thereafter, to have the decree vacated to permit him to interpose a defense, if any.

> **ORS 18.160.** Relief from judgment, decree, order or other proceeding. The court may, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, decree, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect.

Pursuant to the provisions of **Section 29(e)** of the **Bankruptcy Act. 11 USCA 29,** a trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute **proceedings** on behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition of bank-

rupcy. Here, if the appellant contended that the after acquired property adjudicated by the state court was not owned by appellees, he had legal status to attack the judgment of the state court. **Nuckolls v. Bank of California, National Assn.,** 10 Cal. 2d, 266, 74 P. 264; **Garrison v. Seckendorf,** 79 N.J. Law, 203, 14 A. 311, 78 A. 1134, 80 N.J. Law 463; **Weil v. Simmons,** 66 Mo. 617; **Sproul v. Gambone,** 34 F. Supp. 441, 48 Am. Bank. Rep. (N..S) 286.

Appellant's failure to institute proceedings to vacate and set aside the state court decree, as he had a right to do, renders that decree conclusive and final, and he is absolutely precluded from now attacking the same. **c.f. Long & Alistatter Co. v. Willis,** 193 N.E. 774, 48 Ohio App. 366; **In re Edwards' Will,** 94 NYS 2d 810.

ANSWER TO SPECIFICATIONS OF ERROR NOS. III, IV AND V.

In a Preference Suit, the Burden of Proof of All the Elements of a Voidable Preference Rests Upon the Trustee.

> "Just as the trustee in his suit to recover property preferentially transferred must include allegations, in his statement of claim, of all the elements of the alleged voidable preference, so also must the trustee introduce evidence at the trial to sustain all such averments that have not been admitted. The law places upon the trustee (or receiver) the unmistakable burden of proving by a fair pre-

ponderance of all the evidence every essential, controverted element resulting in the composite voidable preference. A presumption arises that payments made by the bankrupt to creditors are valid, and the trustee seeking to recover such payments must overcome this presumption by adequate proof of a voidable preference. Where inferences from proved facts are to be drawn, the rule obtains that if two inferences of substantially equal weight may reasonably be drawn from the proved facts, then that inference shall prevail which sustains the transfer. As indicated previously, in the usual rules of evidence prevailing in the forum will be applied . . ." **Collier on Bankruptcy, 14th Ed. Vol. 3, Sec. 60.62, p. 1043.**

From the foregoing authority it is clear that all of the several elements included in the definition of a preference, as found in Section 60 of the Bankruptcy Act, must be proven by the trustee in order to prevail in a preference suit, **and that the burden of proof is upon the trustee in such suit in the proof of each of the elements.**

In the instant case the vital element is that the alleged transfer (the repossession by the defendants of the merchandise pursuant to the Circuit Court decree on July 1, 1957), was a diminution or depletion of the assets of the bankrupts. Thus, in addition to the matters heretofore discussed, it would be necessary for the appellant to have established by a preponderance of the evidence that the inventory of merchandise re-

covered by the appellees was substantially different than the inventory of merchandise which was in the premises at the time the bankrupts took over in April, 1955.

The evidence is uncontradicted that on April 15, 1955, the value of the stock of merchandise was $28,-000.00, and on July 1, 1957, pursuant to the physical inventory taken, it appears the value of the merchandise was $14,786.17. It is, therefore, clear that there being no excess in the value of the merchandise repossessed over the amount originally left upon the premises, that there cannot be any presumption that such merchandise as was repossessed was all after acquired merchandise. The situation would be far different if the amount repossessed by the defendants was in excess of $28,000.00 rather than being fifty percent of the original value, which was the situation.

In order for appellant to prevail in his contention, the court would be compelled to infer from the testimony as to the sales and purchases during the period of two years and three months of the possession of the bankrupts, that substantially all of the original stock of merchandise had been consumed or sold, and that there remained only the after acquired merchandise. There can be no such inference from such testimony, in light of the State Court decree, and the testimony of the appellees who took the inventory on

July 1, 1957, to the effect that substantial amounts of the original merchandise remained on the premises on that date. As a matter of fact, the District Court found that "at the time defendants took possession there was approximately 50% remaining which was the original stock of merchandise purchased by bankrupts from defendants." (TR. 21).

Furthermore, it is a common phenomenon of merchandising that the merchandise most recently acquired is sold more readily as it is new and fresh. The doctrine which prevails under federal tax statute "last in, first out" should be invoked in this instance to establish that where the inventory repossessed is fifty percent of the inventory originally left with the bankrupts, that the repossessed inventory was substantially that which was originally left with the bankrupts and not after acquired merchandise.

CONCLUSION

For the foregoing reasons, appellees respectfully submit, the judgment of the lower court should be affirmed.

LEO LEVENSON,
MOE M. TONKON,
Attorneys for Appellees.

No. 16504

United States
COURT OF APPEALS
for the Ninth Circuit

FRANK A. DUDLEY, as Trustee of the Estate of Merle K. Branch and Wanda B. Branch, Co-partners d/b/a Riddle General Store, Bankrupts,

Appellant,

v.

CLIFFORD E. DICKIE and MARION E. DICKIE,

Appellees.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

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No. 16504

United States
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FRANK A. DUDLEY, as Trustee of the Estate of Merle K. Branch and Wanda B. Branch, Co-partners d/b/a Riddle General Store, Bankrupts,

Appellant,

v.

CLIFFORD E. DICKIE and MARION E. DICKIE,

Appellees.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

This Reply Brief is submitted to answer certain of the contentions and arguments and clarify some of the statements contained in the Brief of Appellees.

SPECIFICATION OF ERROR NO. 1

Appellees in their argument on this point cite much general law applicable to conditional sales contracts, but studiously avoid the crucial point which is

"Does the law of Oregon permit the use of a conditional sales contract to secure an alleged seller for goods he never owned and never sold?"

The Oregon cases cited by appellant say "no" as do the vast majority of cases in other jurisdictions, and appellees have cited no Oregon, or other, cases to the contrary.

In fact, appellees cite no cases for their point, because there are none. Appellees retreat to the position that the contract is nevertheless good between the parties which points up the vice of their argument under Specification of Error No. 2 that res judicata or collateral estoppel should apply in the preference suit, since they now must admit that the State Court action did not involve the rights of third parties as does this preference suit but only rights as between the original parties.

Contrary to the conclusion of appellees on page 12 of their brief, Kliks v. Courtemanche, 150 Or. 332 did not involve an attempted use of a conditional sales contract by a moneylender but rather by an equipment dealer in the business of selling machinery as stated by the Court on page 334 of said case.

SPECIFICATION OF ERROR NO. 2

Appellees contend that the decree of the State Court finally and conclusively determined "title" to the after-acquired merchandise and cite Oregon Revised Statutes 43.130.

But an examination of sub-section (1) of said statute shows that it applies only to true "in rem" proceedings of which the State Court action in this case was not one. Sub-section (2) of said statute controls here and provides:

> "(2) In other cases, the judgment, decree or order is, in respect to the matter directly determined, conclusive between the parties, their representatives and their successors in interest by title subsequent to the commencement of the action, suit or proceeding, litigating for the same thing, under the same title and in the same capacity."

It is obvious in the instant case that the Trustee is neither litigating for the same thing, *under the same title,* nor in the *same capacity* when he appears in a preference suit under the avoidance sections of the Bankruptcy Act.

To the same effect see Sakamu v. Zellerbach (Cal.), 77 P.2d 313.

A determination of title is subject to all of the general rules applicable to res judicata and collateral estoppel. The Oregon court in Glaser v. Slate, 196 Or. 625, 633, 251 P.2d 441 held that a determination of title as to particular machinery in an earlier case was not binding in a subsequent case where the parties were different. The Oregon Court in Harvey v. Getchell, 190 Or. 205, 225 P.2d 391 determined that a finding of title in a prior proceeding between the same parties (suit to cancel a deed) was not a bar in a suit between the same parties to quiet title.

AVOIDING EFFECT OF JUDGMENT OF STATE COURT

Appellees argue that appellant should have applied to the State Court to vacate the decree in the State Court action and cite Oregon Revised Statutes 18.160 in support thereof.

The Oregon Court in Stites v. McGee, 37 Or. 574, 576, 61 Pac. 1129, with reference to said statute, stated:

> "The decree in question, however, was not taken against the defendants through any of the causes enumerated in the statute, but was rendered with their knowledge and by their express consent, and hence does not come within the provisions of the section referred to."

In other words, the Oregon Court has said that the statute is not applicable to judgments by stipulation such as is involved in the instant case.

Appellants firmly believe, however, that Congress did not intend that the Trustee's rights under the avoidance sections of the Act should depend upon any such shifting basis as the application of the discretionary powers of State Court Judges in vacating or refusing to vacate decrees, and that even if it had been possible for appellant to vacate said decree, he was not required to do so but could bring this independent proceeding to recover the preference.

The Stites case, supra, also points out that where the decree is entered by stipulation, the Court does not inquire into the merits of the case, and hence makes no determination. Thus, as appellant has urged in his opening brief, there is no basis for collateral estoppel arising out of a consent judgment.

SPECIFICATION OF ERROR NO. 5

Appellant fully understands that he has the burden of proof of all of the elements of Section 60 of the Bankruptcy Act.

However, it is an admitted fact, and the lower Court's finding, that the bankrupts were in possession of the merchandise on and prior to July 1, 1957 (Tr. 21). Oregon Revised Statutes 41.360 provides for the usual presumption that:

> "(11) Things in the possession of a person are owned by him."

This statutory provision is declaratory of the common law rule, 20 Am. Jur., Evidence, Section 237, page 234.

Therefore, possession having been shown in bankrupts, the burden is on appellees to prove that they own the merchandise, which they can only do by pointing out and identifying their particular merchandise.

The Court in Bryant v. Swofford Bros. Dry Goods Co., 214 U.S. 279, 29 S. Ct. 614, 53 L. Ed. 997, 1002 upheld a conditional sales contract of dry goods based upon the following findings:

> "The character and marks of the goods rendered them capable of being identified and separated."
>
> "It follows that, so far as the identified goods and notes and accounts are concerned, the intervener, the dry goods company, must prevail."

Thus, it seems to be universally held that in this situation, appellees must identify their merchandise which they have failed to do.

Appellees have suggested to the Court that as a substitute for evidence the Court should indulge in the fiction of last in-first out, a rule which is contrary to the usual rule of merchants.

Appellant respectfully submits that judgment should be entered for appellant in the sum of $14,786.17 with interest at six per cent per annum from October 4, 1957 until paid.

Respectfully submitted,

BOYRIE and MILLER,
F. BROCK MILLER.

No. 16504

United States
Court of Appeals
for the Ninth Circuit

FRANK A. DUDLEY, as Trustee of the Estate of Merle K. Branch and Wanda B. Branch, Co-partners d/b/a Riddle General Store, Bankrupts,

Appellant,

vs.

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Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Oregon.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—9-18-59

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Oregon

In Bankruptcy

Civil No. 9425

FRANK A. DUDLEY as Trustee of the Estate of Merle K. Branch and Wanda B. Branch, Co-partners dba Riddle General Store, Bankrupts,

Plaintiff,

vs.

CLIFFORD E. DICKIE and MARION E. DICKIE, Husband and Wife,

Defendants.

PRETRIAL ORDER

This cause came on for pretrial conference before the undersigned Judge of the above-entitled Court, plaintiff appearing by F. Brock Miller, one of the plaintiff's attorneys, and defendants appearing by Moe M. Tonkon and Leo Levenson, their attorneys.

Subject to the approval of said defendants, said parties agreed upon the following:

Jurisdiction

That suit arises under Section 60(B) of the Bankruptcy Act, and the United States District Court of the District of Oregon, sitting as a Court of Bankruptcy (as provided by Section 2(a) of said Act) has jurisdiction of this cause.

Agreed Facts

I.

Plaintiff is the duly elected, qualified and acting Trustee of the Estate of Merle K. Branch and Wanda B. Branch, copartners dba Riddle General Store, which said estate is being administered by this Court and being designated Case No. B-40999.

II.

That each of said defendants is a resident of the State of Oregon, within the judicial district of this Court.

III.

That on July 1, 1957, and for approximately two years, immediately prior thereto, Wanda B. Branch and Merle K. Branch were copartners doing business under the assumed name and style of Riddle General Store, and said copartners operated a general store at Riddle, Oregon.

IV.

That on July 10, 1957, said Wanda B. Branch and Merle K. Branch, copartners dba Riddle General Store, filed in the United States District Court for the District of Oregon, in Bankruptcy, a petition praying for adjudication as a bankrupt, under and pursuant to said Bankruptcy Act; and, thereafter, and on July 11, 1957, said bankrupt copartnership was duly adjudged a bankrupt; that thereafter plaintiff was elected Trustee of the Estate of said Bankrupts, and duly qualified by filing bond.

V.

That on or about April 11, 1955, defendants sold to said bankrupts a certain general store, then known as Riddle General Store at Riddle, Oregon, including fixtures and equipment, and a stock of merchandise, under and pursuant to a conditional sales contract, which is Exhibit "A" filed herein, and by reference made a part hereof.

VI.

That said conditional sales contract was not acknowledged so as to entitle same to be recorded in the chattel mortgage records, but nevertheless said contract was recorded on June 21, 1957, in Volume 23 at page 678 of the Chattel Mortgage Records of Douglas County, Oregon; that said recording was without legal effect in this cause.

VII.

That said bankrupts operated the Riddle General Store from April 11, 1955, until on or about July 1, 1957.

VIII.

That on or about June 21, 1957, said defendants commenced in the Circuit Court of the State of Oregon for the County of Douglas, a suit against the said bankrupts, a copy of the complaint being marked Exhibit C, in which suit the defendants, as plaintiffs, prayed for a decree of said court, decreeing them to be the absolute owners of all of the furniture, fixtures and stock of merchandise located at the Riddle General Store, free and clear

of any claims, right, title and interest of said bankrupts, and praying for the immediate possession of said furniture, fixtures and stock of merchandise in accordance with the copy of said complaint, marked Exhibit "C" and filed herein.

IX.

That on or about July 1, 1957, the said bankrupts stipulated in writing in said suit, in said Circuit Court, in accordance with Exhibit "D" on file herein, and thereafter, and on said July 1, 1957, a judgment was entered in said Circuit Court suit, foreclosing in favor of said defendants herein the interest of said bankrupts in and to said Riddle General Store in accordance with the decree marked Exhibit "E" and filed herein.

X.

That on or about said July 1, 1957, said defendants took possession of said Riddle General Store, including the inventory of merchandise then on hand, which said inventory was in the amount of $14,786.17.

XI.

That plaintiff did, on October 4, 1957, demand that said defendants return the said merchandise to said plaintiff, or pay for same, and defendants have failed and refused so to do.

XII.

That Merle K. Branch and Wanda B. Branch, individually and as copartners, dba Riddle General

Store, between June 21, 1957, and July 1, 1957, inclusive, were insolvent in that the fair market value of their assets was less than the amount of their liabilities.

XIII.

That plaintiff has on hand the sum of $1,374.44; that no further assets remain to be liquidated.

XIV.

That provable claims have been filed in the bankruptcy proceeding as follows:

A. Priority claims $3,273.32
B. General claims $11,534.48

XV.

Plaintiff makes no claim to the fixtures or equipment sold under said conditional sales contract and subsequently recovered by defendants, and this proceeding is limited solely to the stock of merchandise, possession of which was secured by said defendants on or about July 1, 1957.

Contentions of Plaintiff

I.

That on or about July 1, 1957, said defendants, and each of them, had reasonable cause to believe that said bankrupts, and each of them, were insolvent.

II.

That during the period of the operation of said store by said bankrupts, said bankrupts sold said

merchandise purchased upon said conditional sales contract and replenished same by purchase of other and different merchandise; that the merchandise on hand on July 1, 1957, was not the identical merchandise owned by the defendants and sold to the bankrupts, but rather was merchandise purchased by said bankrupts in replenishment thereof.

III.

That said merchandise was transferred to said defendants, and each of them, as creditors of said bankrupts, for and on account of an antecedent debt, namely, the indebtedness due by said bankrupts to said defendants upon said conditional sales contract dated April 11, 1955.

IV.

That said defendants are not bona fide purchasers for value of the said assets, and the said defendants did not give to said bankrupts a present fair value or any lesser value as consideration of said transfers.

V.

That said transfer to said defendants resulted in a depletion of the assets of the said bankrupts thereby enabling said defendants to obtain a greater percentage of their indebtedness than some other creditors in the same class.

VI.

That said transfers to said defendants constituted a preferential transfer contrary to and voidable

under the provisions of the Bankruptcy Act and, in particular, Section 60 thereof.

VII.

That plaintiff is entitled to judgment against the defendants, and each of them, in the sum of $14,-786.17, with interest at six per cent per annum from October 4, 1957, until paid, and for plaintiff's costs and disbursements incurred herein.

Contentions of Defendants

I.

The judgment and decree of the Circuit Court for Douglas County, Oregon, on July 1, 1957, in favor of defendants and the taking possession of all the property in the Riddle General Store on July 1, 1957, and prior to the filing of the bankruptcy proceedings, did not create a preference.

II.

The plaintiff, as Trustee, is not a bona fide purchaser for value without notice of defendants' title.

III.

The judgment and decree of the Circuit Court for Douglas County, Oregon, on July 1, 1957, restoring to defendants all their right, title and interest in and to the property of the Riddle General Store is res judicata.

IV.

That when defendants took possession of the Riddle General Store on July 1, 1957, they asserted

their legal right to possession of their own property under and by virtue of the conditional sales contract made and executed between the defendants, as sellers, and the bankrupts as buyers on April 11, 1955.

V.

The conditional sales contract was valid between the parties and possession of all the personal property described therein, taken by the defendants prior to the bankruptcy and pursuant to the decree of the Circuit Court of the State of Oregon for the County of Douglas restored them to their rightful ownership of all of said personal property.

VI.

That on July 1, 1957, defendants were entitled to possession of all of the personal property located in the Riddle General Store, in accordance with the provisions of the conditional sales contract executed on April 11, 1955, between defendants, as sellers, and bankrupts, as buyers, and the Oregon Law relating thereto.

VII.

That defendants are entitled to a judgment of dismissal of plaintiff's complaint, and to their costs and disbursements incurred herein.

Issues of Fact

I.

Did defendants, or their agents acting with reference to this transaction, on the date of said trans-

fer, have reasonable cause to believe that said bankrupts were insolvent?

II.

Was the merchandise received by the defendants from said bankrupts the identical merchandise sold by them to said bankrupts, or was it other and different merchandise purchased by said bankrupts from other suppliers, in replenishment of that originally sold by the defendants?

III.

Was the indebtedness due from said bankrupts to said defendants, for which said transfer was made, an antecedent indebtedness?

IV.

Did said transfer to said defendants result in a depletion of the assets of the estate of said bankrupts, thereby enabling said defendants to obtain a greater percentage of their indebtedness than other creditors in the same class?

Issues of Law

I.

Did defendants on July 1, 1957, and immediately prior to the transfer of the stock of merchandise to them, have legal title to all of said merchandise or were said defendants chattel mortgagees of said merchandise?

II.

If said defendants were chattel mortgagees of said stock and personal property, did said defend-

ants perfect the transfer of said stock of merchandise within the meaning of Sections 60a(2) and 60a(6) of the Bankruptcy Act by:

A. Taking possession of said stock of merchandise on July 1, 1957?

B. Securing the stipulation of defendants in said Circuit Court proceeding on July 1, 1957, to take possession of same?

C. Securing the decree of said Circuit Court declaring that said defendants were entitled to possession of said stock of merchandise?

III.

Was the legal effect of said decree of said Circuit Court to declare that defendants had theretofore held legal title to said stock of merchandise, or, in the alternative, to effect a foreclosure upon said merchandise of a pre-existing lien thereon?

IV.

Was the indebtedness due from said bankrupts to said defendants for which said transfer was made an antecedent indebtedness?

V.

Did said transfer to said defendants result in a depletion of the assets of said bankrupts, thereby enabling said defendants to obtain a greater percentage of their indebtedness than other creditors in the same class?

VI.

Was said transfer of said stock of merchandise to said defendants a preferential transfer voidable under Section 60 of the Bankruptcy Act?

VII.

Is plaintiff entitled to Judgment for the return of said stock of merchandise in the event that defendants are unable to return said merchandise for the sum of $14,786.17, with interest at 6% per annum from October 4, 1957, until paid?

VIII.

Was the retaking of the stock of merchandise by the sellers, including after-acquired stock in place of that disposed of, and pursuant to a decree of foreclosure, within four months prior to the filing of buyer's petition in bankruptcy, a preference under the Bankruptcy Act?

IX.

Was the judgment and decree of the Circuit Court an enforcement of a valid pre-existing contractual rights and not a lien obtained by a judgment within the definition of Section 67 of the Bankruptcy Act?

X.

Is the decree and judgment of the Circuit Court res judicata as to the validity of the conditional sales agreement and the rights of the defendants thereunder as against the Trustee in Bankruptcy?

XI.

Are defendants entitled to a dismissal of the suit commenced and for a judgment for costs incurred?

The foregoing is a Pretrial Order agreed upon at a conference between counsel and the Court. It shall not be amended at the trial except by consent or to prevent manifest injustice. It is ordered that this Pretrial Order supersedes the pleadings which now pass out of the picture.

No demand for jury trial was made by either party.

The foregoing Pretrial Order is hereby approved and entered this 10th day of November, 1958.

/s/ GUS J. SOLOMON,
Judge.

The foregoing form of Pretrial Order is hereby approved:

/s/ F. BROCK MILLER,
Of Attorneys for Plaintiff.

/s/ MOE M. TONKON,
Of Attorneys for Defendant.

Lodged August 14, 1958.

[Endorsed]: Filed November 10, 1958.

[Title of District Court and Cause.]

OPINION

December 29, 1958

Solomon, Judge:

The trustee in bankruptcy brings this action under § 60(b) of the Bankruptcy Act to set aside an alleged preferential transfer to Clifford E. and Marion E. Dickie of a stock of merchandise. On April 11, 1955, the bankrupts purchased from the Dickies, who were operating a general store, the stock of merchandise under a conditional sales contract. The bankrupts went into possession of said store and operated it. When they stopped making payments as required by the agreement, the Dickies filed an action against the bankrupts in the Circuit Court of the State of Oregon for the County of Douglas to declare the Dickies to be the owners and entitled to possession of all the furniture, fixtures, and stock of merchandise located at the general store. On July 1, 1957, pursuant to stipulation of the parties, the Circuit Court decreed the Dickies to be the sole owners and entitled to the immediate possession of the furniture, fixtures and stock of merchandise located at the general store, free and clear of all liens, claims, rights, title and interest of the purchasers (bankrupts) and all persons claiming by, through or under them, and on the same day the Dickies took possession of the general store and its stock of merchandise. Within four months the purchasers were adjudicated bank-

rupts, and the trustee then brought this action to set aside the transfer by which the Dickies obtained possession of the stock of merchandise.

Practically all of the facts of this dispute were stipulated except for the portion of the original stock of merchandise which remained unsold during the period of the bankrupts' operation of the store and returned to defendants' possession on July 1, 1957, which amount I find to be approximately fifty per cent of the original stock.

I shall not further discuss the facts nor shall I discuss all of the numerous contentions and issues set out in the pretrial order because in my view the effect of the decree of the Circuit Court of the State of Oregon for Douglas County is dispositive of the issues involved in this case.

The ninth and tenth issues of law in the pretrial order are:

> IX. Was the judgment and decree of the Circuit Court an enforcement of a valid pre-existing contractual right and not a lien obtained by a judgment within the definition of § 67 of the Bankruptcy Act?
>
> X. Is the decree and judgment of the Circuit Court res judicata as to the validity of the conditional sales agreement and the rights of the defendants thereunder as against the Trustee in Bankruptcy?

I find the answer to both is in the affirmative.

In Clark v. Mutual Lumber Co., 5 Cir. 1953, 206 F. 2d 643, the trustee in bankruptcy brought an action to set aside as a voidable preference a mortgage and subsequent foreclosure rendered in favor of defendant by the Circuit Court of Duval County, Florida. The bankrupt corporation had mortgaged its real property to defendant, a creditor of the bankrupt, in the amount of the debt owed by the bankrupt to defendant, and on January 4, 1951, defendant sued to foreclose. The corporation was adjudicated a bankrupt on February 1, 1951, and on February 21, 1951, the Circuit Court of Duval County entered its final decree of foreclosure; the trustee never intervened in the state court proceeding. The Court of Appeals ruled that the state court decree was res judicata on the issue of title or interest to the property, and its determination that the bankrupts had no title bound both the bankrupt and its trustee. The court stated at page 647:

> "It is clear that, upon his election as trustee in bankruptcy, appellant herein became vested with title only to such property as belonged to the bankrupt at the time of the commencement of the bankruptcy proceedings, and has no right to have set aside the transfer of property, such as that here involved, which did not according to the decree of the state court belong to the bankrupt."

See also Stark v. Baltimore Soda Fountain Mfg. Co. (D.C. Md. 1952), 101 F. Supp. 842; Covey v.

American Distilling Co., 7 cir. 1943, 132 F. 2d 453, and In re Mercury Engineering, Inc. (D.C. Cal. 1946), 68 F. Supp. 376.

Defendants shall prepare findings of fact, conclusions of law and a judgment for defendants all in accordance with this opinion.

[Endorsed]: Filed December 29, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on regularly for trial before the above Court sitting without a jury on November 10, 1958, the plaintiff appearing by F. Brock Miller, one of his attorneys, and defendants appearing by Leo Levenson and Moe M. Tonkon, and the Court having heard and considered evidence, both oral and documentary; the admitted facts in the pretrial order; contentions of the parties in the pretrial order; oral argument and briefs of the respective parties, and now being fully advised, makes the following Findings of Fact:

I.

This suit arises under Section 60 (B) of the Bankruptcy Act and the United States District Court for the District of Oregon sitting as a Court of Bankruptcy (as provided for by Section 2 (a)) has jurisdiction of this cause.

II.

Plaintiff is the duly elected, qualified and acting Trustee of the Estate of Merle K. Branch and Wanda B. Branch, copartners, dba Riddle General Store, which said estate is being administered by this Court and being designated Case No. B-40999.

III.

That each of said defendants is a resident of the State of Oregon, within the judicial district of this Court.

IV.

That on July 1, 1957, and for approximately two years, immediately prior thereto, Wanda B. Branch and Merle K. Branch were copartners doing business under the assumed name and style of Riddle General Store, and said copartners operated a general store at Riddle, Oregon.

V.

That on July 10, 1957, said Wanda B. Branch and Merle K. Branch, copartners, dba Riddle General Store, filed in the United States District Court for the District of Oregon, in Bankruptcy, a petition praying for adjudication as a bankrupt, under and pursuant to said Bankruptcy Act; and, thereafter, and on July 11, 1957, said bankrupt copartnership was duly adjudged a bankrupt; that thereafter plaintiff was elected Trustee of the Estate of said Bankrupts, and duly qualified by filing bond.

VI.

That on or about April 11, 1955, defendants sold to said bankrupt a certain general store known as Riddle General Store at Riddle, Oregon, including fixtures, furniture and equipment and a stock of merchandise under and pursuant to a Conditional Sales Contract.

VII.

That said bankrupt operated the Riddle General Store from April 11, 1955, until on or about July 1, 1957.

VIII.

That said bankrupt ceased making payments as required by the terms of the Conditional Sales Contract and on or about June 21, 1957, defendants commenced in the Circuit Court of the State of Oregon for Douglas County, a suit against said bankrupt wherein defendants prayed for a decree adjudging them to be the absolute owners of all of the furniture, fixtures and stock of merchandise located at the Riddle General Store, free and clear of any claim, right, title or interest of said bankrupt and praying for immediate possession of said furniture, fixtures and stock of merchandise.

IX.

That on or about July 1, 1957, the said bankrupt and defendants stipulated in writing in said suit that defendants were entitled to a decree as prayed for in their complaint and pursuant thereto, the Circuit Court of the State of Oregon for Douglas County, entered a judgment in favor of the defend-

ants that they were the sole owners of the furniture, fixtures and stock of merchandise located in the Riddle General Store, free and clear of any claim, right, title or interest of said bankrupt and all persons claiming by, through or under them, and pursuant thereto and on the same day, defendants took possession of the general store and its stock of merchandise.

X.

That at the time defendants took possession there was approximately 50% remaining which was the original stock of merchandise purchased by the bankrupt from defendants.

XI.

The judgment and decree of the Circuit Court for Douglas County, Oregon, on July 1, 1957, in favor of defendants, adjudging said defendants to be the absolute owners of all of the furniture, fixtures and stock of merchandise located at the Riddle General Store, free and clear of any claim, right, title and interest of said bankrupts and prior to the filing of the bankruptcy proceedings, was res judicata and conclusive of the rights of the defendants and the bankrupts and was an enforcement of a valid pre-existing contractual right and not a lien obtained by a judgment within the definition of Section 67 of the Bankruptcy Act; that the aforesaid judgment and possession of said property by defendants did not result in a preference within the provisions of the Bankruptcy Act.

Conclusions of Law

The judgment and decree of the Circuit Court for Douglas County, Oregon, on July 1, 1957, in favor of defendants, adjudging said defendants to be the absolute owners of all of the furniture, fixtures and stock of merchandise located at the Riddle General Store, free and clear of any claim, right, title and interest of said bankrupts and prior to the filing of the bankruptcy proceedings, was res judicata and conclusive of the rights of the defendants and the bankrupts and was an enforcement of a valid pre-existing contractual right and not a lien obtained by a judgment within the definition of Section 67 of the Bankruptcy Act; that the aforesaid judgment and possession of said property by defendants did not result in a preference within the provisions of the Bankruptcy Act.

Defendants Clifford E. Dickie and Marion E. Dickie, husband and wife, are entitled to a judgment dismissing plaintiff's complaint.

Dated at Portland, Oregon, this 5th day of January, 1959.

/s/ GUS J. SOLOMON,
Judge.

Affidavit of service by mail attached.

[Endorsed]: Filed January 5, 1959.

In the United States District Court
for the District of Oregon

In Bankruptcy

Civil No. 9425

FRANK A. DUDLEY as Trustee of the Estate of Merle K. Branch and Wanda B. Branch, Copartners, dba Riddle General Store, Bankrupts,

Plaintiff,

vs.

CLIFFORD E. DICKIE and MARION E. DICKIE, Husband and Wife,

Defendants.

JUDGMENT

The above cause having come on regularly for trial before the above Court sitting without a jury on November 10, 1958; plaintiff appearing by F. Brock Miller, one of his attorneys, and defendants appearing in person and by their attorneys, Leo Levenson and Moe Tonkon, and the Court having heard and considered the evidence, both oral and documentary, the admitted facts in the pretrial order; contentions of the parties in the pretrial order; oral arguments and briefs of the respective parties, and the Court having entered Findings of Fact and Conclusions of Law, and good cause appearing,

It is hereby Ordered, Adjudged and Decreed that

plaintiff recover nothing from defendants and that plaintiff's complaint be and the same is hereby dismissed.

Dated this 5th day of January, 1959.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed January 5, 1959.

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on regularly for trial before the above Court sitting without a jury on November 10, 1958, the plaintiff appearing by F. Brock Miller, one of his attorneys, and defendants appearing by Leo Levenson and Moe M. Tonkon, and the Court having heard and considered evidence, both oral and documentary; the admitted facts in the pretrial order; contentions of the parties in the pretrial order; oral argument and briefs of the respective parties, and now being fully advised, makes the following Findings of Fact:

I.

This suit arises under Section 60 (B) of the Bankruptcy Act and the United States District

Court for the District of Oregon sitting as a Court of Bankruptcy (as provided for by Section 2 (a)) has jurisdiction of this cause.

II.

Plaintiff is the duly elected, qualified and acting Trustee of the Estate of Merle K. Branch and Wanda B. Branch, copartners, dba Riddle General Store, which said estate is being administered by this Court and being designated Case No. B-40999.

III.

That each of said defendants is a resident of the State of Oregon, within the judicial district of this Court.

IV.

That on July 1, 1957, and for approximately two years, immediately prior thereto, Wanda B. Branch and Merle K. Branch were copartners doing business under the assumed name and style of Riddle General Store, and said copartners operated a general store at Riddle, Oregon.

V.

That on July 10, 1957, said Wanda B. Branch and Merle K. Branch, copartners, dba Riddle General Store, filed in the United States District Court for the District of Oregon, in Bankruptcy, a petition praying for adjudication as a bankrupt, under and pursuant to said Bankruptcy Act; and, thereafter, and on July 11, 1957, said bankrupt copart-

nership was duly adjudged a bankrupt; that thereafter plaintiff was elected Trustee of the Estate of said bankrupts, and duly qualified by filing bond.

VI.

That on or about April 11, 1955, defendants sold to said bankrupt a certain general store known as Riddle General Store at Riddle, Oregon, including fixtures, furniture and equipment and a stock of merchandise under and pursuant to a Conditional Sales Contract.

VII.

That said bankrupt operated the Riddle General Store from April 11, 1955, until on or about July 1, 1957.

VIII.

That said bankrupt ceased making payments as required by the terms of the Conditional Sales Contract, and on or about June 21, 1957, defendants commenced in the Circuit Court of the State of Oregon for Douglas County, a suit against the said bankrupt wherein defendants prayed for a decree adjudging them to be the absolute owners of all of the furniture, fixtures and stock of merchandise located at the Riddle General Store, free and clear of any claim, right, title or interest of said bankrupt and praying for immediate possession of said furniture, fixtures and stock of merchandise.

IX.

That on or about July 1, 1957, the said bankrupt

and defendants stipulated in writing in said suit that defendants were entitled to a decree as prayed for in their complaint and pursuant thereto, the Circuit Court of the State of Oregon for Douglas County, entered a decree in favor of the defendants that they were the sole owners of the furniture, fixtures and stock of merchandise located in the Riddle General Store, free and clear of any claim, right, title or interest of said bankrupt and all persons claiming by, through or under them, and pursuant thereto, and on the same day, defendants took possession of the general store and its stock of merchandise.

X.

That on or about said July 1, 1957, and at the time that defendants took possession of said Riddle General Store, including the inventory of merchandise then on hand, said inventory was in the amount of $14,786.17; that fifty per cent of said stock of merchandise was the original stock of merchandise purchased by the bankrupt from defendants, and the remaining fifty per cent was merchandise purchased by said bankrupt from other persons and placed in the stock of merchandise in said store.

XI.

That said conditional sales contract was not acknowledged so as to entitle same to be recorded in the Chattel Mortgage Records, but, nevertheless, said contract was recorded on June 21, 1957, in Volume 23 at page 678 of the Chattel Mortgage

Records of Douglas County, Oregon; that said recording was without legal effect in this cause.

XII.

That plaintiff did, on October 4, 1957, demand that said defendants return the said merchandise to said plaintiff, or pay for same, and defendants have failed and refused so to do.

XIII.

That Merle K. Branch and Wanda B. Branch, individually and as copartners, dba Riddle General Store, between June 21, 1957, and July 1, 1957, inclusive, were insolvent in that the fair market value of their assets was less than the amount of their liabilities.

XIV.

That on July 1, 1957, defendants, and each of them, had reasonable cause to believe that said bankrupts were insolvent.

XV.

That the indebtedness due from said bankrupts to said defendants, for which said transfer was made, was an antecedent indebtedness.

XVI.

That plaintiff has on hand the sum of $1,374.44; that no further assets remain to be liquidated.

XVII.

That provable claims have been filed in the bankruptcy proceedings as follows:

A. Priority claims $3,273.32
B. General claims $11,534.48

Conclusions of Law

I.

On July 1, 1957, and immediately prior to the transfer of the stock of merchandise to defendants, defendants did not have legal title to said merchandise, but rather had a security interest in the nature of an equitable chattel mortgage.

II.

That said defendants perfected their said chattel mortgage within the meaning of Section 60-a (2) and 60-a (6) of the Bankruptcy Act on July 1, 1957, by any of the following acts:

(a) Taking of possession of said stock of merchandise.

(b) Securing the stipulation of bankrupts in the State Court proceedings, agreeing to a decree.

(c) Securing the decree of said State Court, declaring that said defendants were entitled to possession of said stock of merchandise.

III.

The legal effect of said decree of said State Court was to effect a foreclosure upon said merchandise of pre-existing equitable lien thereon.

IV.

The indebtedness due from said bankrupt to said

defendants, for which said transfer was made, was an antecedent indebtedness.

V.

Said transfer to said defendants, resulting in a depletion of the assets of said bankrupt, thereupon enabling said defendants to obtain a greater percentage of their indebtedness than other creditors in the same class.

VI.

That said decree and judgment of said State Court was not res judicata as to the rights of the trustee in bankruptcy in connection with this preference proceeding, but rather had the effect of fixing the date upon which the transfer of the property to defendants was perfected.

VII.

That said transfer of said stock of merchandise to said defendants was a preferential transfer, voidable in accordance with Section 60 of the Bankruptcy Act.

VIII.

Plaintiff is entitled to judgment for return of said stock of merchandise, or, in the event that defendants are unable to return said merchandise, for a decree and judgment for the sum of fourteen thousand seven hundred eighty-six and 17/100 ($14,786.17) Dollars, with interest at six per cent per annum from October 4, 1957, until paid.

Dated this 9th day of January, 1959.

.....,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed January 9, 1959.

Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Frank A. Dudley, Trustee, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment of the said United States District Court for the District of Oregon, entered herein on the 5th day of January, 1959, in favor of defendants and against the plaintiff, and from an order of said District Court entered in said cause on the 13th day of January, 1959, denying plaintiff's motion herein for amended and additional findings of fact and conclusions of law.

Dated this 30th day of January, 1959.

BOYRIE AND MILLER,

By /s/ F. BROCK MILLER,
Of Attorneys for Appellant Frank A. Dudley, Trustee.

I hereby acknowledge service of a copy of the within Notice of Appeal together with bond for

costs on appeal in Portland, Oregon, this 30th day of January, 1959.

/s/ MOE M. TONKON,
Of Attorneys for Defendants.

[Endorsed]: Filed January 30, 1959.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

1. The conditional sales contract between the Dickies and the Branches was, as to third parties and as to after-acquired merchandise, in legal effect, an unrecorded chattel mortgage.

2. Said unrecorded chattel mortgage was not valid as against attaching creditors until the rights of the Dickies were perfected by their taking of possession on or about July 1, 1957.

3. The legal effect of the State Court Decree was to effect a foreclosure of the said unrecorded chattel mortgage.

4. Said State Court Decree is not res judicata of the rights of the trustee in this preference suit.

5. Said State Court Decree determined only that said Dickies were entitled to possession of said mer-

chandise as against the bankrupts, and made no determination that said Dickies held title to said merchandise as against third party creditors, including the trustee in bankruptcy.

6. Said Dickies having consented to the commingling of the merchandise sold by them to the bankrupts, have the burden of pointing out the merchandise in the commingled mass which they sold.

7. Said Dickies failed to point out their merchandise and therefore lost whatever lien, if any, they held against the merchandise originally sold.

8. The trustee is entitled to judgment against the Dickies for the full amount of the merchandise received by them from the bankrupts, namely the sum of $14,786.17, with interest at six per cent per annum from October 4, 1957, until paid.

Dated this 22nd day of May, 1959.

/s/ J. BROCK MILLER,
Of Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed June 1, 1959.

United States District Court, District of Oregon

In Bankruptcy

Civil No. 9425

FRANK A. DUDLEY as Trustee of the Estate of Merle K. Branch and Wanda B. Branch, Co-partners d/b/a Riddle General Store, Bankrupts,

Plaintiff,

vs.

CLIFFORD E. DICKIE and MARION E. DICKIE, Husband and Wife,

Defendants.

Before: Honorable Gus J. Solomon, District Judge.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon—November 10, 1958

Appearances:

MESSRS. F. BROCK MILLER and
WAYNE ANNALA,
Of Attorneys for Plaintiff.

MR. MOE M. TONKON and
MR. LEO LEVENSON,
Of Attorneys for Defendants.

The Court: Call your first witness.

Mr. Miller: If the Court please, the plaintiff will call Mrs. Ruth Paulus.

RUTH PAULUS

a witness produced in behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Miller:

Q. Would you please state your full name for the record? A. Ruth Paulus.

Q. What is your occupation, Mrs. Paulus?

A. Court Reporter.

Q. Are you an Official Court Reporter?

A. I am not an Official now.

Q. Have you been an Official?

A. Yes, I have.

Q. How long have you been a Court Reporter?

A. Nine years.

The Court: What difference would that make?

Mr. Miller: Just trying to establish her qualifications.

The Court: Is there any objection to her qualifications?

Mr. Tonkon: We will admit that this record was taken at [2*] that time. It was taken by the witness. It is true and correct.

Mr. Miller: First of all, let us have the record identified and marked for identification.

(Transcript of Proceedings in the Matter of Merle K. Branch and Wanda B. Branch, No. B-40999, was thereupon marked Plaintiff's Exhibit No. 1 for Identification.)

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Ruth Paulus.)

The Court: Now it is marked. Admitted.

Q. (By Mr. Miller): Handing you Plaintiff's Exhibit 1 for Identification, Mrs. Paulus, do you recognize the same? A. Yes, I do.

The Court: It is already admitted in evidence.

Mr. Miller: It is admitted into evidence?

The Court: Yes.

Mr. Miller: I didn't understand that. I thought he stipulated to her qualifications.

Mr. Tonkon: No, it is admitted.

Mr. Miller: That is all.

There is recited in the pretrial order, your Honor, certain exhibits which are not actually attached.

The Court: Do you want to offer them?

Mr. Miller: We are going to offer them.

The Court: Is there any objection? [3]

Mr. Tonkon: No objection.

The Court: Admitted.

Mr. Miller: They must be marked.

(The following documents were thereupon marked and received in evidence:

(Contract dated April 11, 1955, between Dickie and Branch—Plaintiff's Exhibit 2;

(Court file of Douglas County Circuit Court, No. 20195—Plaintiff's Exhibit 3;

(Copy of stipulation in Case No. 20195, County of Douglas, Oregon—Plaintiff's Exhibit 4;

(Original copy of Order in Case No. 20195—Douglas County—Plaintiff's Exhibit 5.)

The Court: Call your next witness. [4]

WALTER BRITTELL

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Miller:

Q. Please state your full name for the record.

A. Walter Brittell.

Q. What is your occupation?

A. I am a public accountant.

Q. Where do you reside?

A. In Roseburg, Oregon.

Q. Did you know the bankrupts, Merle K. Branch and Wanda B. Branch? A. Yes, sir.

Q. What was your relation to the bankrupts?

A. I was their accountant.

Q. For how long a period of time were you their accountant?

A. During the entire period they operated the store.

Q. In connection with your job, did you keep their books for them? A. Yes, sir.

Q. Would that be including information as to the purchases and sales made by the Branches during their operation of the Riddle General Store?

The Court: Is there any dispute about these books? [5]

Mr. Tonkon: We have looked at them. I see no dispute about the books.

(Testimony of Walter Brittell.)

The Court: Will you admit they are true and correct copies?

Mr. Tonkon: If the witness says they are kept by him and true and correct, that is all right with us.

The Court: Are they?

The Witness: Yes, sir.

The Court: Is there any objection?

Mr. Tonkon: No objection.

The Court: Admitted.

(Ledger book above referred to was thereupon marked Plaintiff's Exhibit 6 for Identification and received in evidence.)

Q. (By Mr. Miller): From the set of books now can you tell us what the purchases and sales of the bankrupts were during the years 1955, '56 and '57? May I say you have prepared those and have it on a piece of paper, do you?

A. Yes, sir.

Mr. Miller: May he read it from his paper?

The Court: Yes. How many copies have you got?

Mr. Miller: Just one handwritten copy.

The Witness: Just one.

During 1955 the sales were $56,366.85. The purchases were $45,151.30.

During 1956 the sales were $65,920.27, and the purchases [6] were $49,005.99.

During 1957 the sales were $14,289.76, and the purchases were $10,970.95.

The figures of 1955 do not include the purchase of the original inventory.

(Testimony of Walter Brittell.)

Mr. Tonkon: Of what?

The Witness: They do not include the purchase of the original inventory.

The Court: The 1955 figures do not include that?

The Witness: No, sir; that is the purchases after the original inventory.

The Court: This was a general store?

The Witness: Yes, sir.

The Court: We could have told him he was going broke at the end of the first year. Obviously, if he bought this much and only sells $56,000, he couldn't stay in business. Proceed.

Mr. Miller: That is all the questions I have, your Honor.

Cross-Examination

By Mr. Tonkon:

Q. Well, now, Mr. Brittell, is it Brittell?

A. Brittell; yes, sir.

Q. The year 1955, the purchases are only from April on—your sales?

A. Yes, sir; I think that is correct. Yes, it is. [7]

Q. That is the date the Branches acquired the stock of merchandise there in the store?

A. Yes, sir.

Q. In 1957 it is only for the period of six months? A. Yes, sir.

Q. May I see that book?

(Exhibit 6 presented to Counsel.)

(Testimony of Walter Brittell.)

Q. Where in this book do you get purchases, from what pages?

A. From two sources, sir. One is on the register where the checks are entered, and the other one——

The Court: Mr. Tonkon, bring that up to him.

(Document presented to the witness.)

Q. (By Mr. Tonkon): Let me withdraw that question. First, where in this ledger—it is called a ledger, isn't it, this book? A. Yes, sir.

Q. Where in the ledger are the sales that you have just enumerated as having been made by the store in 1955, '56 and '57? Where do they appear?

A. They are posted to this sales page in the ledger, and they come originally from the pages of the cash transactions book in the income register.

Q. In other words, this is the basic book?

A. This is the journal of original entry.

Q. As in the cash register, you call it? [8]

A. Yes, sir.

Q. Where you allocate it to sales and cash received? A. That is correct.

Q. Then that is transferred over to this page, to sales by the day, by the month, or whatever?

A. By the month; yes, sir.

Q. By the month. What about the purchases? Where in the book are the purchases?

A. The purchases are the same source, from this cash register and from the check register, and they are posted to the merchandise inventory account in the general ledger.

(Testimony of Walter Brittell.)

Q. Where is the merchandise inventory?

A. This account right here (indicating). This is the original inventory. This is subsequent purchases. These amounts on the credit side are amounts that this account was reduced to for cost of merchandise that was sold.

Q. You say you tried to arrive at that?

A. I made entries in these records every month on a month-to-month basis by an estimate at the end of the year by the use of an inventory figure.

The Court: Actual inventory?

The Witness: Yes, sir.

Q. (By Mr. Tonkon): At the end of each month you had no way of knowing by that cost of sales what items were actually sold, whether it was newly acquired merchandise or old merchandise; [9] no way you could tell from that, was there?

A. No, sir.

Q. When you took your physical inventory at the end of the year was there any way you could tell whether the merchandise was new or old merchandise? A. I didn't take the inventory.

Q. You didn't actually take an inventory?

A. No, sir.

The Court: Did you have any mark-downs for obsolescence or old merchandise? Did they have a system whereby merchandise on the shelves for more than a year would be reduced when they took the inventory?

The Witness: I believe that they did, sir. That

(Testimony of Walter Brittell.)

is quite a common procedure; however, the inventory figure was given to me.

The Court: You don't know whether that was cost price plus a third or whether they took the mark-down?

The Witness: No, sir; I do not.

Q. (By Mr. Tonkon): Do I understand that the item you have given us as purchases is identical to cost of sales?

The Witness: No, sir; it is not.

Q. Wherein is it different?

A. It would differ from the cost of sales by the amount that the inventory went up or down actually in a year's time.

Q. I do not follow you on that. [10]

A. Well, if you—in operating a business of this kind or of any kind, if you start with the inventory at the beginning of the year of, we will say, $10,000 and at the end of the year your inventory is exactly $10,000, then the purchases and the cost of goods sold would be the same figure. However, if the inventory at the end of the year differed from inventory at the beginning of the year, then the cost of sales and the merchandise purchases would differ by that same amount.

Q. Then the figure you have given us is only for purchases. It does not reflect anything with reference to cost of sales?

A. No, sir; those are purchase figures.

Q. You have stated, I believe, that you were unable to determine each month when you made the

(Testimony of Walter Brittell.)

entries from the register of the journal to the purchase inventory page as to whether it was new or old merchandise that was sold?

A. That statement is correct. I could not.

Q. You have no way of knowing?

A. No, sir.

Mr. Tonkon: No further questions.

The Court: Are you going to offer the income tax statements?

Mr. Miller: I can. I will be glad to.

The Court: In your figures did you use month by month to determine the cost of sales?

The Witness: I would have to look at that to be sure. If [11] my memory serves me correctly, and it has been quite a while since I have looked at those or done it. I used, I believe, 75 per cent for cost of merchandise sold during the first year, and I believe that after that time I used the percentage that applied during the first year. I usually do that where I am estimating on a month-to-month basis. I use the percentage figure that was between two lines, two inventory figures, and will use that again until another inventory was taken as the best estimate I have.

Q. (By Mr. Tonkon): Wasn't there a mark-up of a third? A. Sir?

Q. So instead of 25 per cent you just said you use cost of sales?

A. I believe I did. I don't recall. I have not looked at those records, not worked on them.

(Testimony of Walter Brittell.)

Q. Can you look at them and see whether it was a third or a fourth?

The Court: Will that take you some time?

The Witness: No, sir; it should not. The figures the first month are 71½ per cent, is what I used.

Q. 71½?

A. Yes, sir; that is the cost only.

Q. Somewhere between a fourth and a third?

A. Yes, sir.

Q. Thank you. [12]

Redirect Examination

By Mr. Miller:

Q. Mr. Brittell, do you have those income tax returns there for 1955 and '56?

A. They are here on the Clerk's desk.

Q. Have they been marked?

The Court: Is there any objection to their admission?

Mr. Tonkon: No.

The Court: Did you make them, prepare them?

The Witness: Yes, sir; I did.

The Court: All right; admitted.

(United States Individual Income Tax Returns for the Years 1955 and 1956 were thereupon marked Plaintiff's Exhibits 7 and 8 for Identification, respectively, and received in evidence.)

Q. (By Mr. Miller): On the income tax re-

(Testimony of Walter Brittell.)

turns, the amount of purchases and sales for each of those years is stated; are they not?

A. Yes, sir.

The Court: Do they correspond with your books?

The Witness: Yes, sir; they do.

Mr. Miller: That is all I have of this witness.

(Witness excused.) [13]

Mr. Miller: I would like to ask Counsel to stipulate to some things; that the balance owing on the defendants' contract on June 12, 1957, was the sum of——

The Court: Is that all admitted in the pretrial order?

Mr. Miller: I believe it is not, your Honor. That is why I want it in. It is contained on the Exhibit 3. That is incorporated——

The Court: Call your other witnesses. Introduce that later.

Mr. Miller: I have one of the bankrupts. She lives in Riddle, Oregon. I called her about ten days ago to advise her the date was the 10th. I couldn't be certain. Mrs. Mundorff later advised us she was not at all certain it was the 10th. I called Mrs. Mundorff on the 6th. She advised me it would be the 10th. I tried to reach the lady by telephone, reached her only by the telephone at 6:30. She promised to be on her way up. That is all the witnesses I have except for Mr. Branch, one of the bankrupts.

Mr. Tonkon: Well, now, we have discussed the impropriety in the pretrial order, the Agreed Statement of Facts, and we can have them corrected before we proceed.

Paragraph IX appearing on Page 3 of the pretrial order, we would like to have the words "* * * that said defendants were entitled to foreclosure of said contract" eliminated because the stipulation speaks for itself, and there is nothing [14] in the stipulation about any foreclosure.

The Court: Very well. That is all right.

Mr. Tonkon: It should read, "That on or about July 1, 1957, the said bankrupts stipulated in writing in said suit, in said Circuit Court, in accordance with Exhibit 'D' on file herein"——

The Court: You want to strike "said defendants were entitled to said foreclosure of said contract"?

Mr. Tonkon: Right.

The Court: It is stricken. Are there any other changes in the pretrial order? Otherwise, I am going to sign it.

(Thereupon, the Court signed the pretrial order.)

The Court: Do you know what you want him to stipulate to now?

Mr. Miller: Yes, your Honor; I want to stipulate as to the balance owing to the defendants from the bankrupts on June 12, 1957.

The Court: Yes; how much?

Mr. Miller: If I can be handed the complaint

and summons which were put in evidence, I could give the Court the figure.

The Court: Don't you know what it is, Mr. Tonkon?

Mr. Tonkon: I have a rough idea.

Mr. Miller: It is approximately $16,000.

The Court: Do it during the lunch recess. Figue that out. [15] Call your first witness, Mr. Tonkon.

CLIFFORD E. DICKIE

a Defendant, called in behalf of Defendants, having been first duly sworn, was examined and testified as follows:

The Court: Mr. Dickie, you are one of the defendants in this case?

The Witness: Yes, sir.

The Court: Where do you live?

The Witness: 7412 Beaverton-Hillsdale Highway.

The Court: In Portland?

The Witness: Yes, sir; Raleigh Hills.

Mr. Tonkon: Your Honor, my associate has some idea that we are going to be put at a disadvantage if this witness, our witness—we have two witnesses to go on the stand, but prior to that we would——

The Court: You have convinced me. About what time is your witness going to show up? (To Mr. Miller.)

Mr. Miller: She was supposed to be here. I suppose she ought to be here by now.

The Court: We will start at 2:00 o'clock.

Mr. Tonkon: Maybe your Honor wants to hear some of the legal aspects, or do you want to wait until it is all over?

The Court: I think that is best, that we hear the case and [16] the legal arguments after.

I wanted to say that I had some grave doubts as to whether a conditional sales contract was appropriate in a transaction of this kind, and I would agree with Mr. Miller that this is really an unrecorded chattel mortgage, but I am disturbed about the decree that was entered and whether or not I am bound by that decree. That is one of the things that complicates the issue. If there was no decree, I think probably Mr. Miller would have a pretty good case.

Mr. Tonkon: Well, that is another point I would think only as to certain facets as to the after-acquired property. There is a factual proposition——

The Court: As to the fixtures?

Mr. Tonkon: As to the fixtures, as to the actual merchandise, we will have proof to dispel any idea that at the time that they took over in July of 1957 there was only newly acquired merchandise in there, or if they had merchandise in the premises at the time they repossessed it in July it was left there originally under the conditional sales contract, why, they would be entitled to have that, but that even does not constitute the stock. Your point on the matter of whether it is a chattel mortgage, we want to be heard on that.

The Court: I am not making any final determination. I think Mr. Miller does not want to reach that question himself. I think he has some clients that enter into similar agreements. [17]

Mr. Miller: I have submitted a brief in that, and the only thing I can say about that subject matter, if I am confused, the Oregon Supreme Court is confused. I am not sure what the law—I will be quite candid—I have briefed it to this extent. There is no case in Oregon on a conditional sales contract on an open stock of goods.

Mr. Tonkon: Is there anywhere?

Mr. Miller: Yes; there are. I can give you some. There are many chattel mortgage cases. There is not one, to my knowledge, and I have read them all, in which the Oregon Supreme Court upheld a chattel mortgage on a fluctuating stock of goods, on a chattel mortgage where one definitely was not recorded.

The Court: When was this conditional sales contract recorded?

Mr. Tonkon: It was recorded, but we are not holding anything for its recordation. In the first place, the Clerk had no business recording it. It was not acknowledged. In the second place, it was recorded about ten days before we took possession. In Oregon a conditional sales contract does not have to be recorded, but these people elected to do business on that basis. Now that is it. Now, just because the Supreme Court has held in many cases that you have to record a chattel mortgage to have it valid, that does not disturb our position.

The Court: You do not have to convince me on that. The only question is: Is a conditional contract, or has a [18] conditional sales contract of an open stock of merchandise been construed as an unrecorded mortgage? I think many states do.

Mr. Miller: Of course, we have got the case of Davis vs. Wood, which I cited to your Honor in 200 Oregon, and in which the Oregon Court, I thought, bespoke itself for once in plain language and said they would not consider such documents as conditional sales contracts; only as unrecorded chattel mortgages.

Of course, there are two possibilities from the plaintiff's standpoint here. One of those, of course, is that an alleged conditional sales contract on an open stock of merchandise is in the same category as a mortgage on an open stock of merchandise and, therefore, is no better than the chattel mortgage. That is one theory. The second theory is this: That is, that this conditional sales contract says I am selling you X items. Then it goes on to say you are to go out and buy and then I am to have security for the indebtedness due on X on items Y and Z.

I tried to give your Honor numerous decisions but certainly not all on this point; but when you start——

The Court: You do not have to convince me on that. Are you contending that you acquired a lien on after-acquired purchases?

Mr. Tonkon: No. [19]

The Court: They do not make that contention.

Mr. Tonkon: No, we say that that contract was very clear.

Mr. Miller: They say they owned it.

Mr. Tonkon: Right.

Mr. Miller: That's right; they don't say they had a lien. They say they owned it; that it would rise above a lien.

The Court: That is even worse.

Mr. Tonkon: Why?

The Court: Do you mean you declare that when Merle Branch and Wanda Branch in 1956 and 1957 purchased a plow or some shirts that you became the owner of it?

Mr. Tonkon: That is what the contract says; that is what the contract says.

The Court: Mr. Tonkon, did you draw that contract?

Mr. Tonkon: No, but that is what the contract says. We have these cases involving automobiles that are on conditional sales contracts. A fellow puts a radio on, he puts a tire on, he puts a headlight on, something like that, and they become part of the——

The Court: Do you mean to say that when a person puts a tire on that it belongs to the owner?

Mr. Tonkon: Right.

The Court: Have you ever tried any of those cases?

Mr. Tonkon: No, but the conditional mortgagee has the same right as against this as the other tires they took off. [20]

The Court: I tried one of those cases. They got the tires back.

Mr. Tonkon: It was not because of the actual lien. I am talking about the lien rights.

The Court: I do not think that does it.

Mr. Tonkon: This agreement clearly says that.

The Court: That is what it says.

Mr. Tonkon: He is saying in so many words by virtue of the authorities he has cited that the whole agreement is invalidated because it affects after-acquired property.

The Court: They are trying to do by a conditional sales contract what ordinarily is done by a chattel mortgage on a fluctuating stock of merchandise. I have grave doubts as to whether that can be done by contract.

(Noon recess taken.) [21]

Afternoon Session

(Proceedings herein were resumed at 2:00 p.m. of the same day, pursuant to the noon recess, as follows:)

The Court: Call your next witness.

Mr. Miller: If the Court please, the plaintiff will call Mrs. Branch.

WANDA B. BRANCH

called in behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Miller:

Q. Mrs. Branch, please state your full name.

A. Wanda Bernice Branch.

Q. You were one of the bankrupts along with your husband, Merle Branch, in this proceeding?

A. I was.

Q. In other words, of the operation of the Riddle General Store you were one of the copartners; is that right? A. That's right.

Q. Did you in fact from day to day take part in the operation of that business?

A. I did. [22]

Q. In other words, you were generally there working in the store? A. Yes, sir.

The Court: What did you do in the store?

The Witness: I was clerking, and there was only the two.

The Court: You and your husband?

The Witness: Yes.

The Court: You helped buy merchandise?

The Witness: Helped buy merchandise.

The Court: Did you know what was purchased?

The Witness: I did, yes.

The Court: Will you first tell us what kind of a store it was, what some of the items were?

The Witness: It was a general store, and it had

(Testimony of Wanda B. Branch.)

paint, hardware, shoes, wearing apparel, notions; just a general store.

The Court: Groceries?

The Witness: No; no groceries.

The Court: Men's and women's clothing?

The Witness: Yes.

The Court: Work clothes?

The Witness: Work clothes and things, yes.

The Court: Farm implements?

The Witness: No; no farm implements; appliances.

The Court: Electrical appliances? [23]

The Witness: Yes.

The Court: Furniture?

The Witness: No furniture.

Q. (By Mr. Miller): You had plumbing and hardware, too, did you not? A. Yes.

Q. You started the operation of the store, I believe, some time in April of 1955; is that correct?

A. That is correct.

Q. And continued the operation until approximately July of 1957? A. That is correct.

Q. During that period of time did you make your purchases from month to month of various items of merchandise? A. We did that.

Q. When you purchased these items of merchandise, what did you do with them?

A. Well, we put them out for resale.

Q. Did you keep segregated the new items purchased from the old stock?

A. No; we didn't do that.

(Testimony of Wanda B. Branch.)

Q. You started your store out with a stock of merchandise, as I understand it. Is that right?

A. We did.

Q. Which was purchased from, I believe, the defendants in this [24] proceedings?

A. That's right.

Q. And thereafter you periodically bought new merchandise? A. We did.

Q. Is your answer that you did not segregate the new merchandise from the old?

A. No; we did not.

Q. What did you do with it?

A. We mixed it with the other. We put it on the shelves.

Q. Were you ever instructed by the defendants in this proceeding not to mix the new merchandise with the old? A. Never.

The Court: Does the contract so provide, that the new merchandise will be kept separate?

Mr. Miller: It does not, your Honor. I have some law on the subject, but I thought as long as we had her here we would bring it out.

Q. You were in the store until approximately July 1, 1957? A. That is correct.

Q. Can you tell us, was all the merchandise there at that time, was that all new merchandise, or was it all old merchandise?

Mr. Tonkon: Your Honor, I must object to the type of questions Counsel is asking. They are leading. He should ask—I mean he should let the witness do more answering.

(Testimony of Wanda B. Branch.)

The Court: I don't think that that was very much of a [25] leading question. Go ahead. Do you understand the question? Just before you closed up or the defendants filed that action against you and your husband, how would you compare the old merchandise that was in there at the time you purchased the store with the amount of new merchandise that was in there?

The Witness: I would say there was at least half of it was new. At least half of it was.

The Court: At least half of it?

Mr. Levenson: I didn't hear.

The Witness: At least half of it was new merchandise.

The Court: In other words, quite a bit of the merchandise which you had originally purchased from Mr. and Mr. Dickie was slow-moving merchandise and merchandise that didn't sell at all?

The Witness: That is correct.

The Court: Will you tell us what kind of merchandise that was that didn't sell?

The Witness: Well, there was—well, hardware, it moves fast.

The Court: Hardware is a good seller?

The Witness: Yes.

The Court: So most of the hardware you would say that you purchased from the Branches had been sold by June, by the time that they filed the action against you?

The Witness: Well, I don't know that most of it, but there was quite a bit of hardware, yes. And

(Testimony of Wanda B. Branch.)

then there was men's [26] work clothes. They sell pretty fast. Well, appliances don't move real fast, electrical appliances, things like that.

The Court: As I understand it, you and your husband took over this store in 1955?

The Witness: That's right.

The Court: Do you remember what month?

The Witness: April.

The Court: April; and you purchased—in that purchase there was quite a bit of merchandise; is that correct?

The Witness: Yes; there was.

The Court: There was electrical appliances and hardware and men's work clothes and all that type of merchandise?

The Witness: Yes.

The Court: Do you recall how many appliances there were when you acquired the store?

The Witness: No; I do not.

The Court: Did you sell any appliances in the two years that you had the business?

The Witness: We sold some.

The Court: Did you buy any more appliances, new appliances?

The Witness: For the store?

The Court: Yes.

The Witness: Well, they don't move too fast, and we had a floor plan, and there was that setup.

The Court: In other words, as far as the appliances were [27] concerned, those appliances that remained in the store in 1957 were the ones that

(Testimony of Wanda B. Branch.)

you took over when you purchased the store from the Dickies?

The Witness: No; there was appliances there that we had and that were in the store that we put in, and we had television in there, too.

The Court: What about that, then?

The Witness: The television, the floor appliances and the appliances, in a certain amount of time we had to pay for those.

The Court: The people who had television there had it on floor plan, and they took their television back, didn't they?

The Witness: I do not remember. I think they were still there.

Mr. Miller: They probably took them back after she vacated the store.

The Witness: I think so. I think they were there when we left the store.

The Court: Do you recall any of the appliances in 1957 that were there in 1955?

The Witness: There was Youngstown sink.

The Court: Yes?

The Witness: It was there when we left. It was there when we bought the store. It was there when we left.

The Court: That is one item. Were there any refrigerators there in 1957 that were there in [28] 1955?

The Witness: No.

The Court: No refrigerators. Any radios, washing machines?

(Testimony of Wanda B. Branch.)

The Witness: No.

The Court: What was there in 1957 that was there in 1955 in the line of electrical appliances?

The Witness: Oh, I don't know; I couldn't answer that. I don't know. I couldn't answer that. I don't remember. I will have to think a minute.

The Court: Have you got a list of the items that were taken in 1957?

Mr. Miller: No, your Honor, I have neither a list of items in 1955 nor any in 1957.

Q. Mrs. Branch, was an inventory taken when you vacated the premises?

A. No; there wasn't.

Q. July 1, 1957? A. No.

Q. Did you take a physical inventory when you moved in in April, 1955? A. No; we did not.

Q. Do you know whether one was taken either of those two dates? A. No; I do not.

Q. How about the hardware, then? Were there quite a few items that you purchased in 1955 in the store in 1956? [29]

A. Well, it was small hardware, and it would be sort of hard—I couldn't say that either. We purchased new hardware all the time.

The Court: Were there some slow-moving items in hardware that didn't sell very well, that would lay over for two years, about two years approximately, or two and a half?

The Witness: Well, I know there was pots and pans and there was spatulas and things along that line that didn't—that's all I can——

(Testimony of Wanda B. Branch.)

The Court: There were pots and pans and some spatulas?

The Witness: And things like that.

The Court: That were there in 1957, that you acquired?

The Witness: Yes.

The Court: Do you know approximately how many?

The Witness: I mean they were there in 1955 when we purchased the store.

The Court: They were there in 1957?

The Witness: They were just things like that, and I couldn't say on the real hardware line. I couldn't say.

The Court: You had started with one-half of your hardware stock, or one-third or one-fourth?

The Witness: Well, hardware, I guess we got our paints and things along that line when we had Kem-Tone paints that they didn't have in the store. We put that in the store after we purchased it. [30]

The Court: What kind of paint did they have?

The Witness: Pittsburgh paint.

The Court: How much Pittsburgh paint did you have in 1957 when they took the store back?

The Witness: I couldn't say.

The Court: Was there quite a bit?

The Witness: There was quite a bit.

The Court: There was quite a bit?

The Witness: Yes; there was.

The Court: Was that the Pittsburgh paint that was there when you acquired the store?

(Testimony of Wanda B. Branch.)

The Witness: No; we purchased the Pittsburgh paint all the time we were there.

The Court: Was there any Pittsburgh paint that you acquired originally that was there when you gave up the store?

The Witness: I imagine there was some gallons that were there. The gallons, they don't move as fast.

The Court: How much? Was there one-third the stock, one-fourth the stock?

The Witness: I couldn't say.

The Court: The Kem-Tone paint, was that your biggest seller, or did you have more Kem-Tone than you had Pittsburgh when you closed up?

The Witness: No; we didn't have more Kem-Tone. We had a lot of Kem-Tone in there. [31]

The Court: Half Kem-Tone?

The Witness: I would say.

The Court: How about men's work clothes? Did you have many of the items that you originally acquired at the time you closed it?

The Witness: Well, we had some sales to do away with that.

The Court: Sales? What do you mean?

The Witness: Well, to try to move some of the old stock.

The Court: Mrs. Branch, I am not trying to criticize you. I am just trying to find out what items were in the store. This is a legal proposition.

The Witness: Yes; I understand.

The Court: What items did you have in the

(Testimony of Wanda B. Branch.)

store in 1957 at the time you closed up or at the time they filed that action against you that you had when you bought the stock from Mr. and Mrs. Dickie? That is all we want to know.

The Witness: Well, I couldn't say because there is too many articles in that store. It is just a general store, and I couldn't say.

The Court: In 1955 I understand you bought $45,000 worth of merchandise. Is that correct?

The Witness: Well, if the records are in the books, that is correct.

The Court: Was that general merchandise of all kinds that you bought? [32]

The Witness: Yes, sir.

The Court: Was there a lot of merchandise that you took over from Mr. and Mrs. Dickie that you never sold at all in the two years?

The Witness: Yes; there was stock there that didn't sell any too easy.

The Court: That is precisely the thing I want to talk to you about.

Mr. Tonkon: We didn't hear that.

The Court: She said there was quite a bit of merchandise. Let me repeat that. I understand that there was quite a bit of merchandise in 1957 when the store was closed up, that you originally purchased from Mr. and Mrs. Dickie?

The Witness: Well, I would say there was at least half new merchandise in the store when we left it, and it was the old stock, yes.

The Court: It is your best judgment that one-

(Testimony of Wanda B. Branch.)

half of the merchandise that you had in 1957 was merchandise that you originally purchased from Mr. and Mrs. Dickie in 1955?

The Witness: Would you repeat that again, please?

The Court: Is it your best judgment that in 1957, July 1st, July 1, 1957, you had quite a bit of merchandise in the store, didn't you?

The Witness: Yes, sir.

The Court: Would you say that one-half, approximately [33] one-half of that merchandise was merchandise that you purchased in 1955, not from any dealers?

The Witness: Yes, sir.

The Court: But from Mr. and Mrs. Dickie?

The Witness: I would say that.

The Court: All right. That is all I want to know.

Q. (By Mr. Miller): As I understand it, this Kem-Tone paint is made by Sherwin-Williams Paint Company; is that right?

A. That's right.

Q. Did I understand you to say you had some on hand at the end, that is, July 1, 1957, but you didn't acquire any of that from the Dickies?

A. No; we didn't acquire that from the Dickies.

Q. But you had some on hand?

A. Yes; we did have.

Q. Were there other items that you had on hand at the end that you didn't have at the beginning other than general classes of items?

A. Well, there was a drier there that I remem-

(Testimony of Wanda B. Branch.)

ber that we didn't—you can't distinguish because it is a store show, just what the——

The Court: Did you deal with the same suppliers that Mr. and Mrs. Dickie dealt with?

The Witness: Most all were the same suppliers.

The Court: Would you say that there was a considerable [34] amount of merchandise that was obsolete at the time you purchased it, that couldn't be sold?

The Witness: That's right.

Q. (By Mr. Miller): I was going to ask you, actually, is it possible for you, even if you saw an inventory, to tell which of the merchandise was purchased originally from the Dickies and which might have been purchased at a later date from a supplier? A. No; you couldn't tell.

Q. Is that because the merchandise in general was purchased from the same people?

A. That is correct; that's right.

Q. Same type of merchandise?

A. That's right.

Mr. Miller: That is all.

The Court: Mr. Tonkon?

Cross-Examination

By Mr. Tonkon:

Q. Mrs. Branch, at the time you and Mr. Branch took over the store from the Dickies there were very little, if any, appliances in the premises, were there? A. No.

Q. Your answer is what?

(Testimony of Wanda B. Branch.)

A. No; I don't recall any appliances; only that Youngstown [35] Kitchen.

Q. As a matter of fact, during the time you operated that store and you started this appliance business on a bigger scale, you floored all your appliances there; isn't that right?

A. That's right.

Q. That means that you had somebody loan you the money on a particular appliance, and when you sold it, you would repay that; is that right?

A. It was a floor plan; yes, sir.

Q. When the business was closed and the Dickies took it back in July, 1957, that money was still owing on the appliances; is that right?

A. If there was anything in the store, all with the exception of the drier, and it was paid for.

Q. Yes, but all the other appliance items, there was something outstanding on them?

A. I am sure there was.

Q. When you bought merchandise during the time you and Mr. Branch operated the store there, you bought such merchandise as you thought would be readily salable? A. That is correct.

Q. What would you say as to whether or not the merchandise you bought after you went into possession back in April, 1955, was more readily salable than the merchandise that was there prior to that time that you acquired from the [36] Dickies? A. What I would say?

Q. Would you say it was more salable?

A. I do; yes, sir.

(Testimony of Wanda B. Branch.)

Q. In other words, the new merchandise moved out more quickly than the old merchandise?

A. Well, there is a certain amount of anything that you buy that does not move.

Q. But, as a rule, you would say that most of the new merchandise moved out very quickly?

A. Well, there is—it did, and then there was some—it's just like anything you buy.

Q. I can understand if you bought a hundred dollars worth of shoes some of them would remain, but, as a rule, would you say 90 per cent of it might go out, $90 out of $100 would be sold very quickly?

A. I would not say that much, no. That's too much of a per cent.

Q. This stock that you acquired in April, 1955, contained a lot of staple items, would you say?

A. I would say.

Q. Items that were necessary for general stores of that character? A. That is correct.

Q. Some of which you might sell and some of which you might not sell for a year or two years hence, depending upon a want [37] for the particular item; is that right?

A. You mean is that what we purchased?

Q. No, no. When you bought the store from the Dickies, it had certain types of merchandise in there that you might be able to sell today and you might not be able to sell for a couple of years because it was a necessary staple item in a store of that character.

The Court: I think she said about 50 per cent

(Testimony of Wanda B. Branch.)

of the merchandise that was originally acquired was still in the store at the time they took it back.

Mr. Tonkon: Well, now, I want the witness to be understood to have said also, and I think she has, that the merchandise she purchased more recently was the merchandise that went out of the store more quickly.

The Court: That would necessarily be true, Mr. Tonkon. If she purchased $136,000 worth of merchandise and she still had $11,000 worth of merchandise that was originally purchased, that would necessarily be the case.

Mr. Tonkon: As long as your Honor understands it.

Q. As I understood, Mrs. Branch, you said you didn't take an inventory either at the commencement of your operation in April, 1955, or when you turned over the possession pursuant to the Court's decree in July, 1957.

Mr. Miller: I object to that portion of the question which refers to the Court's decree. [38]

The Court: That does not establish anything anyway. He is just fixing the time.

Mr. Tonkon: Would you read the question, Mr. Reporter?

(Last question read.)

The Witness: We didn't take an inventory either dates. We took an inventory between, of course, but not on those dates; not on anything prior, no.

(Testimony of Wanda B. Branch.)

Mr. Tonkon: That is all with this witness.

The Court: That is all.

Redirect Examination

By Mr. Miller:

Q. The inventory which was taken, was it broken down so that when it is read you could tell which items were still on hand? A. No.

Mr. Tonkon: She said she didn't take an inventory, your Honor.

Mr. Miller: She said she took inventories in between.

Q. Now, the inventory which was taken, how would you go about taking it?

Mr. Tonkon: Would you please identify which inventory?

The Court: Do you have those inventories?

The Witness: The inventories?

Mr. Miller: They are in my office, your Honor. They are of no value here. [39]

Mr. Tonkon: That is all I am trying to establish as to that.

The Court: You do not have to establish that. He agrees.

Mr. Miller: No further questions.

Mr. Tonkon: What am I agreeing to, your Honor?

The Court: Those inventories are of no value.

Mr. Tonkon: That is all right.

The Court: You and the Dickies are not unfriendly to each other, are you?

(Testimony of Wanda B. Branch.)

The Witness: Well, I don't know. We are really friendly, but there is, I suppose, feeling there. I don't know.

Recross-Examination

By Mr. Tonkon:

Q. Prior to April, 1955, when you purchased the store from the Dickies, had either you or both you and Mr. Branch been connected with the store in any way?

A. Yes, sir; I worked in the store.

Q. How long?

A. I worked approximately two years.

Q. Two years?

A. A year and a half with the Dickies. I worked in the store.

Q. I can't hear you.

A. I worked in the store a year and a half before buying the store. [40]

Q. Did Mr. Branch work in the store?

A. No; he did not.

Q. You were thoroughly familiar with the contents of the store, as to how it was operated, and everything? A. Not, no; no, I wasn't.

Q. What did you do in the store prior to that time?

A. I was a clerk, and you don't know the business of the store when you are a clerk.

Q. You knew what was being sold there, though? A. Yes, sir.

(Testimony of Wanda B. Branch.)

Q. You sold all the merchandise in the store, not any particular department?

A. No, I sold—it was a general store. I was all over the store; yes, sir.

Q. Did you prior to April, 1955, when you were an employee there, did you price some of the merchandise? A. Oh, yes.

Q. In other words, you would take the prices off the invoice, and the mark-up was explained to you?

A. I marked the merchandise and put it on the shelf.

Mr. Tonkon: I think that is all.

Mr. Miller: No further questions.

(Witness excused.)

Mr. Miller: If the Court please, Counsel for defendants and [41] I wish to stipulate that the balance owing from the Branches to the Dickies on June 12, 1957, which would also be true on July 1, 1957, was the sum of $16,697.17, and that the original sale price of the store was $30,000, and that the contract—and this is in evidence—fixes the value of the fixtures at $2,000.

The Court: All right. Is there an agreement on the value of the merchandise that was taken back?

Mr. Tonkon: We are going to have evidence on that with the inventory, your Honor.

Mr. Miller: It is an agreed fact in this proceeding, your Honor, that the inventory was in the amount of $14,786.17. That is Agreed Fact No. 10.

The Court: How do you arrive at that figure?

Mr. Tonkon: We have the actual inventory taken.

The Court: Fair market value or original cost?

Mr. Tonkon: I would like the witness to explain it. We will put on a witness at the proper time who took it.

Mr. Miller: If the Court please, that concludes plaintiff's case in chief.

I might just state to your Honor that I have put on no particular evidence in this suit as to reasonable cause for belief of insolvency, except as it appears on the exhibit, the sworn complaint of the defendants in the Circuit Court proceedings; that there were certain things wrong; that they knew about [42] that.

Mr. Tonkon: We will save time on that. Defendants will admit that on the date that they acquired possession that they had reasonable cause to believe that the bankrupts were insolvent.

Mr. Levenson: Your Honor, we would like to move for a judgment—or a directed verdict if there is such a thing in the Federal Court, or summary judgment, on the ground that the plaintiff has not established his case that there was a transfer in violation of the Bankruptcy Act.

The evidence up to now, considering the exhibits here, shows that the plaintiff was the owner of everything in the store.

The Court: As of what date?

Mr. Levenson: As of the date of the judgment of the Circuit Court of the State of Oregon.

The Court: Yes, but isn't that often the case in a bankruptcy, that they were owners for three months or four months?

Mr. Levenson: In our judgment, your Honor, this was not a judgment establishing a lien, your Honor. The judgment was based upon a cause of action for declaratory relief in which the Court was asked to declare the plaintiffs to be the absolute owners of the furniture, fixtures, and stock of the merchandise.

The Court: Does the title that you give to an action make very much difference? Wasn't it actually a foreclosure of the [43] lien? That is what you usually do in a conditional sales contract.

Mr. Levenson: In certain kinds of cases the Court may go to the pleadings to see what the issues were, but the issue in the case, if you look at the prayer in that case—I don't have it handy.

The Court: What difference does that prayer make?

Mr. Levenson: It was an adjudication that the plaintiffs are the owners of that merchandise, and the Court so found. There was no appeal from that.

The Court: Was this a contested case?

Mr. Levenson: Which case?

The Court: Was that case a contested case?

Mr. Tonkon: Your Honor, I don't see what difference it makes whether it was contested. You cannot go back of the decree under the theory my associate has advanced; furthermore, the decree in and of itself exempts, so far as the title of the defendant in this action, the plaintiffs in that suit,

or anybody that was on the premises because it applied to someone else so it is our contention that once that court has entered its decree in that suit determining we are absolute owners of all the inventory and the assets there, that this Court has no right to examine it. It isn't a question of giving us a lien, was that correct? All the matters involved in the suit, whatever may be the nature of the suit, are merged in the decree [44] that gives us the title as to the property. That is our position. I am prepared to cite law.

(Discussion between Court and Counsel.)

The Court: Mr. Tonkon, I am going to take your motion under advisement until I have an opportunity to look at it. Call your first witness. [45]

MARION E. DICKIE

a Defendant, called in behalf of Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tonkon:

Q. What is your full name?

A. Marion Elizabeth Dickie.

Q. You are one of the defendants in this action?

A. Yes; I am.

Q. Your husband is the other defendant?

A. Yes.

Q. When did you and your husband first acquire the Riddle General Store at Riddle, Oregon?

A. Do you mean when we bought it?

(Testimony of Marion E. Dickie.)

Q. When did you buy it? A. 1948.

Q. Did you and your husband operate that continuously until what date?

A. 1955, in April.

Q. That is about the time you sold it to the Branches? A. Yes.

Q. Were you active in the operation of the store? A. Yes.

Q. Your husband was with you?

A. Yes. [46]

Q. I think you heard the testimony of Mrs. Branch that she worked for you about a year and a half? A. I think it was a little longer.

Q. As I understand it, this was a general merchandise store; is that right? A. Yes.

Q. How many such stores were there in Riddle?

A. Well, there was one across the street; however, they carry groceries, which we didn't, but they had a scattering of general merchandise.

Q. They were not exclusively general merchandise like yours?

A. No; there wasn't any other store in Riddle just like our store.

Q. What does the community depend upon for its real business?

A. Do you mean the real business?

Q. Yes.

A. They have the mine. They opened up the mine after we were there, but it was lumber mostly.

Q. Lumbering? A. Yes.

Q. About how many people in the city?

(Testimony of Marion E. Dickie.)

A. Well, mostly that varied. It was one of these little boom towns. When we went there, there weren't so many, but at the time we sold I think the population probably had almost trebled. Now that's a pure guess. [47]

Q. You have not given me any figure to what it was trebled?

A. I couldn't say. It seems like it was 600 people right in the city limits.

Q. Somewhere between 600 and 1,000, would you say? A. Yes.

Q. Now, Mrs. Dickie, in April, 1955, you agreed to sell your store to the Branches, Mr. and Mrs. Branch? A. Yes.

Q. What was the reason you were selling the store? A. Because of my husband's health.

Q. What was the matter with your husband?

A. He had had a heart attack.

Q. It was necessary for you——

A. To dispose of the store. It was too much for me to take care of.

Q. Tell us generally how you arrived at a price of the sale with the Branches?

A. Well, they asked us to buy the store and wanted to know how much down, and so we were surprised that they wanted it. I mean, we had not been pushing the sale of the store but just sort of hand-to-mouth advertising with our wholesale houses, and so all of a sudden Mrs. Branch approached us with the idea that they might like to

(Testimony of Marion E. Dickie.)

buy it, and so we took the inventory at the first of the year.

Q. That is the first of the year 1955? [48]

A. Yes; January 1, 1955, which we took our inventory at the first of the year, and so we asked them if they would like us to take an inventory, which we would arrive at a figure on the inventory being the sales and purchases, what we had sold off of that and by the purchases up to the date, and so they said that was fine with them, and that is how we arrived at that figure.

Q. Did you prepare at that time a general inventory of the merchandise on hand?

A. You mean a listed inventory?

Q. Yes. A. No.

Q. I don't mean detailed; I mean a general inventory. A. Yes, general inventory.

Q. That is as of April 1, 1955? A. Yes.

Q. May I have this marked, please?

(Document, inventory of 1955, marked Defendants' Exhibit 10 for Identification.)

Q. (By Mr. Tonkon): Is that the general inventory you are referring to? A. Yes.

Q. That was prepared by you? That is your own writing? A. That's right.

Q. That was prepared on about April 1, [49] 1955? A. That's right.

Q. That shows generally what you have in the way of merchandise in the general classifications?

A. That's right.

(Testimony of Marion E. Dickie.)

Mr. Tonkon: We would like to offer that in evidence, your Honor.

Mr. Miller: For what purposes was that prepared, Mrs. Dickie?

The Witness: For the sale to the Branches.

Mr. Miller: That was specially——

The Witness: To arrive at an inventory price to the Branches.

Mr. Miller: That was especially prepared to show them?

The Witness: Yes; this was prepared for the Branches.

Mr. Miller: I believe the document is entirely self-serving, your Honor. It is not a record kept in the ordinary course of business.

The Court: That would not make any difference.

Do you have a 1954 inventory, the one that was taken on December 31, 1954?

The Witness: I don't have it here. We have it.

Q. (By Mr. Tonkon): Was this Exhibit 10 for Identification, was that computed from the inventory made as of the end of 1954? A. Yes.

Q. You prepared it personally?

A. Well—— [50]

The Court: I am going to admit it.

(Document previously marked Defendant's Exhibit 10 for Identification was thereupon received in evidence.)

Q. (By Mr. Tonkon): In 1957 approximately

(Testimony of Marion E. Dickie.)

during the month of June, the Branches had not made payments in accordance with the terms of their contract with you and Mr. Dickie?

A. No; they hadn't.

Q. They were in default? A. Yes.

Q. You had employed lawyers to take whatever action was necessary? A. Yes.

Q. I believe they filed a suit in your behalf?

A. Yes.

Q. Then after the Court made a decree that is in evidence here, did you go to the place of business and take another new inventory?

A. Yes, with the help of Mr. and Mrs. Knight and their daughter.

Q. Who are Mr. and Mrs. Knight?

A. They are the people that we originally bought the store from.

Q. That is back in 1948? A. 1948.

Q. They lived there in Riddle?

A. Yes. [51]

Q. They are an old couple? A. Yes.

The Court: What difference does it make if they are old or young?

(Document presented to the witness.)

The Court: Are those inventory sheets that you used or made up at the time that you took the inventory in July, 1957?

The Witness: Yes.

The Court: You helped prepare it?

The Witness: Yes.

(Testimony of Marion E. Dickie.)

Q. (By Mr. Tonkon): Is that your writing on all the paper?

A. Not on all of those papers. There is a lot of Mr. Knight's writing.

The Court: Show it to me.

Q. (By Mr. Tonkon): But it was all done under your direction?

The Court: Who priced it out? Who priced the inventory out?

(Inventory sheets above referred to marked Defendants' Exhibit No. 11 for Identification.)

The Witness: The prices were on the merchandise, the retail prices, and we took a third off of it.

The Court: Because that was the average mark-up, was a third?

The Witness: Yes. [52]

Mr. Tonkon: That is the same way you took the inventory as appears from Exhibit 10; is that right?

A. Yes.

Q. In April, 1955? A. Yes.

Mr. Tonkon: We offer Exhibit 11 in evidence, your Honor.

Mr. Miller: If the Court please, I really have no objection to its introduction except I am wondering what its purpose is. We have as an agreed fact in here that the amount is $14,786.17, which this inventory shows.

Mr. Tonkon: We are laying a foundation.

The Court: I think it is certainly pertinent. It is the most pertinent document that has been intro-

(Testimony of Marion E. Dickie.)

duced so far on the question of inventory because maybe the witness can testify as to what items were there at this time as compared to what items were there originally.

Mr. Miller: I have no objection, your Honor.

The Court: Objection overruled. The exhibit is admitted.

(Document previously marked Defendants' Exhibit 11 for Identification was received in evidence.)

Mr. Tonkon: He didn't make an objection, your Honor.

The Court: Even if he did, I would overrule it.

Mr. Tonkon: We do not want error in the record.

Mr. Miller: Well, then, I object. [53]

Q. (By Mr. Tonkon): Did you at my instance prepare a summary, comparing the different classifications of items appearing upon Exhibit 10 and Exhibit 11 to show the amounts of the different classifications that appear in the inventory of April 1, 1955, and those that appear in July 1, 1957?

A. Yes, I did.

Mr. Tonkon: May we have that marked, please?

(Summary above referred to marked Defendants' Exhibit 12 for identification.)

The Court: Are those different items or just in duplication of the same?

Mr. Tonkon: They are all the same. That sum-

(Testimony of Marion E. Dickie.)

mary is Exhibit 12 for identification that you have in front of you now.

A. Pardon me, I didn't hear you.

Q. Is that summary the Exhibit 12 that you have in front of you now? A. Yes.

Mr. Tonkon: We offer it in evidence, your Honor.

Mr. Miller: I still can't see the relevancy.

The Court: I am going to overrule the objection and permit the exhibit in conditionally, anyway. It is a document from which the witness could testify. Is that what you want her to do?

Mr. Tonkon: That's right.

(Document previously marked Defendants' Exhibit [54] 12 for Identification was thereupon received in evidence.)

Q. (By Mr. Tonkon): Now, looking at Exhibit 12, Mrs. Dickie, will you compare the difference in the inventory taken on April 1, 1955, of school supplies and paper products with those appearing in the inventory that was taken by you on July 1, 1957?

The Court: What do you mean, compare?

Mr. Tonkon: Well, let her read these figures.

The Court: I can read. I am not very smart, but I can read.

Mr. Tonkon: Well, there seems to be some question as to whether this document in and of itself can be part of the record.

(Testimony of Marion E. Dickie.)

The Court: The basic underlying documents, these were taken from inventory sheets?

Mr. Tonkon: Right.

The Court: This is just a compilation from that?

Mr. Tonkon: Yes.

The Court: I am going to admit it on the basis that it was taken from the inventory sheets and is based upon Exhibits 10 and 11.

Mr. Tonkon: Right.

The Court: This is just a summary, and I think, under the law, these summaries are admitted, and I am going to admit them. [55]

(Document, Summary previously marked Defendants' Exhibit 12 for Identification, was thereupon received in evidence.)

Mr. Miller: Up until now I can't see any relevance to the document. It doesn't tend to prove anything yet.

The Court: That is what we have to find out right now. I said I don't know what you mean by "compare." Mrs. Dickie, would you tell me this: On the first item, school supplies and paper products, are you in a position to tell us what portion of the inventory, which was $250.46, which existed on July 1, 1957, was there on April 1, 1955, what items?

The Witness: I think that would be very difficult.

The Court: Doesn't the mark—did you put a

(Testimony of Marion E. Dickie.)

date on the box of each school supply when it arrived?

The Witness: No, the only thing I can remember is that I did a lot of mark-up work myself in the store along with Mr. Branch, and I know when we took the store back that my markings were all over the merchandise, I mean price marks, and we used a grease pencil so I couldn't even venture a guess as to what was there.

The Court: In other words, on only some of the inventory or boxes you recognize your own pricing mark?

The Witness: Yes.

The Court: So you knew that it was merchandise that was purchased prior to April 1, 1955? [56]

The Witness: That's right.

The Court: Do you know which of those paper supplies were actually in the store on April 1, 1955?

The Witness: I couldn't say exact at all.

The Court: Could you say as to an estimate?

The Witness: I don't think I could even estimate.

The Court: Do school supplies sell quickly or slowly?

The Witness: At the time we had to sell the store they had slowed up for this reason, that they had opened a drugstore right down by the school. We used to do a terrific school business, and then our school business—we were nearly up straight from the school on the——

The Court: How many times did you ordinarily

(Testimony of Marion E. Dickie.)

turn the school supplies and paper products; three times a year, four times a year, six times a year?

The Witness: Oh, no, I think we bought them about, little by little, but we usually bought our main——

The Court: In July?

The Witness: At one time during the year, yes, around in July.

The Court: That is when most of the school supplies are purchased?

The Witness: Yes, but you filled in once in a while.

The Court: Was the same thing true of greeting cards?

The Witness: Yes, well, greeting cards, they moved the [57] greeting card counter clear to the back of the store. We did a tremendous business in greeting cards because we set it right up in front because when they set it back there I don't believe they were doing any volume of greeting cards at all.

Mr. Miller: If the Court please, I object to that, a conclusion based upon no facts, a pure conclusion, no foundation for that.

The Court: Objection overruled. Did you take this inventory yourself on the greeting cards?

The Witness: Yes.

The Court: Did you have a lot of your own boxes?

The Witness: Yes.

(Testimony of Marion E. Dickie.)

The Court: Was there a considerable amount of boxes that you recognized your grease pencil on?

The Witness: Well, now, wait a minute, I think you have it wrong. It is a case where they are filed underneath. The greeting cards are displayed up above, and the drawers are full of them; however, you know, you get used to looking at the greeting cards and not whether they could have replaced the same ones.

The Court: They could have replaced the same ones so you are not in a position to say definitely whether all or any of these cards that were there on July 1, 1957, were there on April 1, 1955?

The Witness: No, I know there were a lot of them that were there. [58]

The Court: How, by the color?

The Witness: Yes, they change.

The Court: Your greeting cards change. What about your dry goods? Do you recognize a lot of old friends there, too?

The Witness: Yes.

The Court: There was a lot of that obsolete merchandise?

The Witness: Yes.

The Court: What type of item didn't move?

The Witness: Oh, you know, you get offbeat shirts or something like that once in a while, but we used to put them on sale and turn it over, but my handwriting or marking was on a lot of dry goods, too. I can't say it was on all of them.

The Court: What was that?

(Testimony of Marion E. Dickie.)

The Witness: It was not on all of it; however, it was Mrs. Branch's, but I don't know whether she marked it up when she was with us or when they purchased.

The Court: Were the individual shirts, for example, were they marked, or was just the box marked?

The Witness: No, individually marked every shirt.

The Court: Now the shoe department, were there a lot of shoes there that were originally sold to them in April, 1955?

The Witness: That is where we noticed my handwriting was very predominating, in the shoe department.

The Court: In other words, in the shoes was a substantial portion of the items that were sold that were still in stock as [59] of July 1, 1957?

The Witness: Yes.

The Court: Could you estimate the dollar volume?

The Witness: Dollar value, you mean?

The Court: Yes.

The Witness: Well, I don't believe I could. They went in more for frivolous shoes, which they sold out. Ours were more staple products, I mean, staple shoes like the average wearing shoes.

The Court: They didn't sell so well?

The Witness: No, the frivolous shoes——

The Court: Didn't sell well?

The Witness: There were six pair, I remember

(Testimony of Marion E. Dickie.)

six pair of high-heel shoes which we didn't carry in stock.

The Court: Those staple shoes ordinarily sell better than frivolous shoes, don't they?

The Witness: Yes.

The Court: I understand you had quite a few staple, or did you have quite a few of the frivolous?

The Witness: No, I had staple shoes.

The Court: But two years later they were still in stock?

The Witness: May I explain this? Well, we bought more expensive shoes than they did because we would not stock the cheap shoe because it would not hold up on the gravel schoolyard with youngsters. So they bought a cheaper shoe which [60] moved out faster so it left our more expensive shoes there on the shelves, and they are still sitting there.

The Court: The expensive ones?

The Witness: The more expensive ones.

The Court: How about sporting goods and housewares? Was there a lot of merchandise that you inventoried July 1st? That constitutes the balance that was on April 1, 1955?

The Witness: I couldn't see any change in that from the time we left because we bought out the sporting goods division from another store and put it in, and I couldn't see any change except lessening of merchandise.

The Court: But the housewares was about five times as much as the sporting goods originally?

(Testimony of Marion E. Dickie.)

The Witness: Yes.

The Court: Did you recognize some of your old pencil or crayon marks?

The Witness: Yes, some merchandise in that.

The Court: What about the hardware?

The Witness: The hardware, yes; however, that is also hard to distinguish because some of it was in bins, some of the pipe fittings were in bins, and so that would be hard to determine; however, it was a long ways down from what we kept it.

The Court: What about paint?

The Witness: The paint, the only thing we noticed was this Kem-Tone paint, and I know the exact price on it because [61] we asked the wholesale man that was going to take it back, and that is $265. We were selling it for that because we can't get rid of it. It was all the stock.

The Court: The Pittsburgh paint was better paint?

The Witness: Yes.

The Court: Sold more?

The Witness: That's right.

The Court: Did it sell pretty fast?

The Witness: Well, we did, but they didn't seem to like it. That is why we put the Kem-Tone in.

The Court: Are there certain colors that sell more rapidly than others?

The Witness: I think so.

The Court: Could you recognize your pencil marks on these paints, too?

(Testimony of Marion E. Dickie.)

The Witness: You can recognize the can color. Pittsburgh had just changed their labels.

The Court: When?

The Witness: Just a short time before we sold the store. We had stocked a lot of new paint, too, and these old labels cans were still there.

The Court: So you had a lot of old cans?

The Witness: Yes, with the old label on them.

The Court: Could you tell us about how much?

The Witness: I am not sure. [62]

The Court: Did you have as much as a thousand dollars, would you say?

The Witness: We had more than that.

The Court: On July 1, 1957?

The Witness: Oh, we had a lot more than that, I am sure.

The Court: $1500, $2000?

The Witness: Gee, I don't know. I would hate to guess. I would hate to venture a guess.

The Court: All right; go ahead.

Q. (By Mr. Tonkon): Well, now, Mrs. Dickie, could you make an estimate as to how much of the merchandise that was inventoried by you on July 1st, 1957, in this store at Riddle, Oregon, was the same as the merchandise that was sold to the Branches on April 1, 1955?

Mr. Miller: If the Court please, I am going to object to that. In answer to the Court's question, she kept saying, "I don't know." Now, I don't know how she can suddenly——

(Testimony of Marion E. Dickie.)

The Witness: That would be awfully difficult because I don't think I could give you——

Q. (By Mr. Tonkon): Have you any idea at all?

The Court: Of course, that would not do me very much good.

The Witness: The only thing I know was there was $265 worth of paint and six pairs of high-heeled shoes that were different in the store and we didn't——

Q. Then you are saying that substantially all of the [63] merchandise that you took inventory of on July 1st was there on April 1, 1955; is that right? A. No.

Mr. Miller: If the Court please, I object to that. That is Counsel's conclusion.

The Witness: I am saying—I am sorry.

The Court: Let her go ahead. This witness has been answering very honestly, I think. Go ahead and tell us what you were going to say. You don't have to worry about what Mr. Tonkon is asking. You just answer the way you want to answer. You were saying that that is what you said, that substantially all the stock that was there on July 1, 1957, was there on April 1st. You said you knew definitely about the Kem-Tone paint and the six pairs of high-heeled shoes. Then you were about to say something else. Go ahead and say it.

The Witness: Well, if there was any change in the other, it would be the same as I believe what

(Testimony of Marion E. Dickie.)

we left there, and I couldn't distinguish whether we bought it or they bought it, see.

Q. (By Mr. Tonkon): But you did see a lot of old price marks on the merchandise?

A. Yes, I did.

Q. On the appliances after you acquired the stock in July, 1956, were you required to make payment to some financing agency for them? [64]

A. Let's see, now. I didn't understand that.

Q. On the appliances, did you have to pay somebody for them afterwards? A. In 1957?

Q. Yes.

A. Yes, we put the appliances that were there on consignment from appliance wholesalers. They were taking them back, and they offered them to us.

Q. In other words, they had come to repossess them, and you told them to leave them, but you would not buy them? A. Yes.

The Court: I don't think that is involved in this case at all. We all know that they took the appliances back. The figure that I would be most interested in is what is the dollar volume during this period of appliances that were purchased from appliance wholesalers and other possible dealers at that time. Do you have that broken down?

Mr. Tonkon: Of the appliances?

The Court: Yes.

Mr. Tonkon: You mean during the time the Branches were in possession?

The Court: Yes. The reason for it is this: There

(Testimony of Marion E. Dickie.)

was a hundred and some-thousand dollars business done in about two years which cost $104,000. It is practically unbelievable that very much of the stock that was in there April 1, 1955, should [65] be there on July 1, 1957, unless a great deal of the dollar volume is accounted for by the very transactions about which Mrs. Dickie has testified; namely, that they have gone into the business of appliances that were floored plus the cheaper items that they have sold, which might have moved a little faster, but a built-up inventory of $136,000, I mean to sales, would be quite a bit on items of clothing. It is usually bigger items that account for this dollar volume.

Mr. Tonkon: Your Honor is asking for something that is within the province of the plaintiff in this case. They have the books and records. They have the bankrupt here; nothing under the control of the defendants. The burden is on the plaintiff to show that, too.

The Court: I am not saying that it is your province or duty or anybody's duty. I am just calling attention to this condition.

Q. (By Mr. Tonkon): When you were in the operation of this business up until 1955, what was your experience as to whether the newer merchandise you bought moved out of the business by way of sales more readily than the older merchandise?

A. Well, definitely, the newer merchandise, turned over. As your styles turn over, it turns over faster. You keep the staple stuff that you

(Testimony of Marion E. Dickie.)

have to have. Maybe you sell one in five years, but you still have to have it in case of plumbing, wiring, electrical wiring or things. [66]

The Court: What percentage of your stock would be the items that do not move more than, say, once a year or once every two years?

The Witness: That would be hard to venture a guess on because we had electrical, complete electrical fixtures for wiring a house or plumbing or plumbing a house and painting a house, and so it would be hard to guess.

The Court: Do you operate the store now?

The Witness: Do we? We have Mr. and Mrs. Knight taking care of it for us, your Honor, the people we purchased it from.

Mr. Tonkon: You may cross-examine.

Cross-Examination

By Mr. Miller:

Q. Mrs. Dickie, how long did you say you operated this store before you sold it to the Branches?

A. Over seven years.

Q. Seven years? A. Yes.

Q. What was the usual amount of inventory you had on hand during those seven years?

A. Between that period?

Q. What was the average, say, what was the average the year before you sold it?

A. It was right around $30,000. It would go up higher, you [67] know, and then it would lower

(Testimony of Marion E. Dickie.)

itself. They are seasonal. It is seasonal, a lot of that, just before Christmas.

Q. Will you say it was $30,000 that was your approximate average inventory?

A. I think that would be a good guess.

Q. So that at the time that you sold you had on hand an approximate average inventory; is that right? A. That's right.

The Court: Could you tell us how much business you did in the year 1954? What was your gross business?

The Witness: Well, it was just under a hundred thousand. It was ninety-some thousand.

The Court: $97,000?

The Witness: Ninety-some thousand. I am sorry, just guessing on those figures.

The Court: In 1955 until you sold it, do you know how much business you did?

The Witness: Wait a minute. Maybe I heard you wrong the first time.

The Court: 1954, that was the full year before you sold?

The Witness: Yes.

The Court: How much did you do in the first four months of 1955; January, February, March—three months?

The Witness: That I don't have figures on.

The Court: Was that about the same average? [68]

The Witness: Yes, of course, it starts picking up from about March on.

(Testimony of Marion E. Dickie.)

The Court: You were doing that without the sale of heavy appliances?

The Witness: Mrs. Branch made the statement there weren't any appliances in there, but we had a lot of refrigerators, ranges and appliances in there at the time they took the store over.

The Court: Oh, you did?

The Witness: Yes, we did. We had a big floor, and we had to pay for those cash on delivery, so we didn't have a flooring plan. It was just coming in as we sold the store so ours were not on consignment.

The Court: Had you done a pretty good business in appliances?

The Witness: Yes, we did.

The Court: Do you know how often you used to turn your stock on paints?

The Witness: No, I don't believe that was ever really broken down.

The Court: Are there any further questions?

Q. (By Mr. Miller): How often did you turn your stock generally, or how many times a year, let us say, did you turn your stock?

A. Well, we did ninety-some thousand last year. On, we will say, approximately $30,000 we must have turned it three times, [69] but that is not turning the complete stock now because some of it, it will turn over ten times or twenty times against the slow-moving.

Q. Would you normally keep stock for a year or two years?

(Testimony of Marion E. Dickie.)

A. Yes, we still have some in plumbing down there that we purchased the first year we were in there. Those big malleable fittings, for instance, were very necessary.

The Court: She is wrong when she says she turned it over three times. Even on her figures, she only turned it over twice. $90,000 on a $30,000 inventory is twice because she was discounting it a third, you see.

Q. (By Mr. Miller:) Were you in the store at the time you sold it to the Branches until you went in there on July 1, 1957?

A. Was I in the store?

Q. Had you ever been in the store?

A. Oh, yes.

Q. How many times?

A. I have no idea on that; not too often after we moved away from town there. I went back periodically.

Q. Mrs. Dickie, without trying to confuse the testimony, my recollection of it when we examined you under 21(a), you stated you had not been down there until sometime in 1957.

A. No, I didn't make that statement. You check closely.

The Court: What difference would that make, Mr. Miller?

Mr. Miller: Well, your Honor, she has testified to a lot [70] of things that took place during this time.

(Testimony of Marion E. Dickie.)

The Court: I didn't hear it. I just heard what she testified to at the time that she sold the store and what she testified to at the time she took the inventory thereafter. I heard no part of the testimony between those dates.

Mr. Miller: She said she used to put on sales then. I wondered how she knows.

The Court: That would not be admissible here anyway. She didn't so testify here today.

Mr. Miller: All right, your Honor. I will go on with it from there.

Q. Mrs. Dickie, you do not actually have any idea dollar-wise what these items that remained would total up to now, do you?

A. No, I really do not.

Q. No. You are also not here trying to tell this Court that what you did sell to the Branches is completely dead stock, are you?

A. No, I am not trying to tell the Court that we sold a dead stock to them. Is that the question you asked me?

Q. Yes.

A. No, we did not sell a dead stock to them. We sold a stock that involved live merchandise plus slow-moving merchandise.

The Court: Was that a clean stock that you sold?

The Witness: Yes.

The Court: Had you gotten rid of most of the obsolete goods [71] by sales?

The Witness: Maybe this will answer your ques-

(Testimony of Marion E. Dickie.)

tion. When they took over the store, I stayed with them for two and a half weeks, and Mrs. Branch and myself were very friendly at the time, and I was trying to help them put on an opening sale. We had gone over the store to find some dead stock to put on the sale, and we had a horrible time doing it, but my intention was it was all clean stock.

Q. (By Mr. Miller): You testified, Mrs. Dickie, that the Branches bought cheaper shoes. Now, as a matter of fact, you don't know what they bought simply month to month, do you?

A. Yes, sir. The only thing I can say is I was in the store off and on, stopped in the store off and on, and, naturally, you see the stock in the store.

The Court: Is there any further cross-examination?

Mr. Miller: I have no further questions, your Honor.

The Court: Any further questions?

Mr. Tonkon: No.

The Court: That is all.

(Witness excused.) [72]

The Court: Do you have any more testimony?

Mr. Tonkon: No, the only other testimony may be cumulative.

The Court: That is the testimony.

Let me look at that sales book or the ledger for a minute. You can't tell anything from these books.

Mr. Tonkon: I tried to find something out, and I couldn't.

The Court: I am going to make some findings of fact here without regard to the ultimate outcome. I am going to find on the basis primarily of plaintiff's own testimony that on July 1, 1957, one-half of the stock of merchandise was stock that the bankrupts acquired from the defendants on April 1, 1955. Now, that does not mean that the plaintiffs are entitled to a judgment for that amount because I don't know. I am concerned about this judgment in the State Court, and I am going to think about that and read the cases that you are suggesting.

Mr. Miller: If the Court please, I have never, in deference to Counsel, taken the matter very seriously. I wonder if I might submit additional memorandum. I just put in a couple cases because, as I say, on principle it did not seem to me it was applicable, and I don't think so, on the question res judicata. So I would like permission to submit additional memorandum on that one point.

The Court: I saw your cases. I read the first part of your brief. I read all of Mr. Tonkon's brief.

Mr. Miller: May I make a correction in my briefs before [73] I forget? My girl made a very serious error. On page 1 in Line 20 the words "chattel mortgage" should be exactly opposite. They should be "conditional sales contract"—"it is not the office of the conditional sale contract to provide security upon property never owned or sold by seller."

The Court: I will hear your argument.

(Argument by Counsel for the respective parties to the Court.)

The Court: In view of my holding that one-half of this merchandise was in the possession of the bankrupt July 1, 1957, acquired from the defendants, are you contending that the defendants are not entitled to that, also?

Mr. Miller: Oh, yes; I certainly am. That is one of the reasons why I gave your Honor the brief on burden of proof for the whole doctrine of confusion of goods is involved, the doctrine of confusion of goods, and the cases I have cited there simply state that if a man allows his merchandise to get mixed up with merchandise that does not belong to him under such state that it cannot be segregated, then he will lose. There are several cases on that.

The Court: But the point is that your own witness indicated that there was one-half.

Mr. Tonkon: At least one-half, she said.

The Court: One-half of the merchandise that was sold to her was still in her possession, but this is not an action for [74] the return of specific goods. It is an action for the return of the money.

Mr. Miller: The burden is on them to identify the merchandise. I have asked everybody questions, and they cannot identify it.

The Court: What difference would it make if they could have identified each particular piece, because your lady testified as to the half? Now,

suppose that she came to that conclusion by identifying each item? Well, I don't want to question you any more. I just call that to your attention.

Mr. Miller: I will hand your Honor this memo and give one to Counsel for whatever it is worth. The things I would like your Honor to ask Counsel——

The Court: You ask him.

Mr. Miller: All right, I will ask Counsel. Counsel keeps talking about how they acquire title to this merchandise, and I would like to know where they do.

The Court: It seems to me that the defendants did not get the amount they were claiming, $14,250, because I cannot believe that stock would be that much off. Anybody who looks at the way they did business, the amount of purchases made to the sales, would know that these people had to go broke, and if they are operating on that one-third basis now, the plaintiff's are going to be in a very serious position, if they are not already, because you can't operate on that basis now, so I don't think [75] the merchandise was worth that full amount.

I think there is good reason to believe that these contracts have to be strictly construed, but as to the amount of merchandise which the evidence showed was originally sold, I think probably the equities are in favor of the defendants. Of course, none of this take into consideration the rights which the defendants may have acquired by reason of the State Court action, the res judicata, nor

does it take into consideration Mr. Miller's co tention that the transaction was, in effect, an u recorded chattel mortgage and that they have rights.

I think that there should be some place whe the parties should have a meeting of the mind but if they cannot, of course, I am here to deci the case. I am not trying to shirk my respo sibilities.

Mr. Miller: I would like to have some time brief the point on res judicata.

The Court: Everybody can have all the ti they want. You may have two weeks.

Mr. Tonkon: We may have opportunity to repl

The Court: Yes, surely. You take two weel Mr. Levenson or Mr. Tonkon can have two weel

In the meantime, we are going to take a lo at it. We are not going to take a look at th case on the law until the briefs are in so th if it is possible to get together, let us know. Ho ever, if you can see right now that you cann do it, [76] then we will start working on the ca

Mr. Miller: I would like to have permission return the 1957 income tax. Have you any objectio

Mr. Tonkon: No.

(Trial Concluded.)

[Endorsed]: Filed May 21, 1959. [77]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss:

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Pretrial Order; Opinion of Judge Solomon; Findings of fact and conclusions of law; Judgment; Plaintiff's motion to amend findings, etc.; Notice of appeal; Bond for costs on appeal; Order extending time to docket appeal; Statement of points upon which appellant intends to rely on appeal; Stipulated designation of contents of record on appeal; Order authorizing clerk to transmit original exhibits; and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9425, in which Frank A. Dudley as Trustee of the Estate of Merle K. Branch and Wanda B. Branch, co-partners dba Riddle General Store, is the plaintiff and appellant and Clifford E. Dickie and Marion E. Dickie, husband and wife, are the defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and appellees, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of testimony filed in this

office in this cause. together with exhibits 1 to 5, inclusive; 7, 8, 10, 11 and 12.

I further certify that the cost of filing the notice of appeal, $5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 11th day of June, 1959.

[Seal] R. DE MOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 16504. United States Court of Appeals for the Ninth Circuit. Frank A. Dudley, as Trustee of the Estate of Merle K. Branch and Wanda B. Branch, co-partners d/b/a Riddle General Store, Bankrupts, Appellant, vs. Clifford E. Dickie and Marie E. Dickie, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: June 12, 1959.

Docketed: June 18, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 16509.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROSEWOOD HOTEL, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decision of the Tax Court of the United States.

PETITIONER'S OPENING BRIEF.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROSEWOOD HOTEL, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

A. Statement as to Jurisdiction.

On June 12, 1958, Respondent mailed (by Registered Mail) his "90 day letter" (Notice of Deficiency) wherein he proposed, against Petitioner, deficiencies in federal income and excess profits taxes for the fiscal year ended November 30, 1954 and in federal income taxes for the fiscal year ended November 30, 1955 [Tr. pp. 9-13].

This registered letter was mailed to 3421 West 2nd Street, Los Angeles, California and returned to Respondent marked "Not known at this address" [Tr. p. 18].

On July 17, 1958 Revenue Agent Goddard *personally* served Nathan Stein (officer, director and sole stockholder of Petitioner) with the *same original* "90 day letter" which had, on June 12, 1958, been mailed to 3421 West 2nd Street, Los Angeles, California and returned to Respondent—as aforesaid [Tr. p. 18].

On October 3, 1958 (*113* days after June 12 and *82* days after July 17) Petitioner filed its Petition For Review of Deficiency Determination with the Tax Court of the United States [Tr. pp. 3-13 and 38].

On March 20, 1959 the Tax Court entered its order dismissing said Petition "for want of jurisdiction" [Tr. pp. 25-27] and on April 8, 1959 the Tax Court denied Petitioner's Motion for Rehearing [Tr. p. 28].

On May 4, 1959 Petitioner filed its Petition for Review herein [Tr. pp. 29-35].

This Court has jurisdiction to entertain this Petition by virtue of the provisions of Sections 7482 and 7483 of the Internal Revenue Code.

The tax returns in question were filed with the District Director of Internal Revenue at Los Angeles, California [Tr. p. 3] and therefore, under Section 7842 (b) (1) of the Internal Revenue Code the venue for this action is with this Court.

B. Statement of Facts.

Petitioner filed its federal income and excess profits tax returns for the fiscal year ended November 30, 1954 and income tax return for the fiscal year ended November 30, 1955 with the District Director of Internal Revenue at Los Angeles, California [Tr. p. 3].

On June 12, 1958 (within the statute of limitations for fiscal year 1954 because return not filed—after extensions granted—until June, 1955) the Respondent *mailed* (by registered letter) his "90 day letter" proposing deficiencies for the fiscal years ended November 30, 1954 and November 30, 1955 [Tr. p. 3 and pp. 35-37].

However, This Registered Letter Was Addressed and Sent to 3421 West 2nd Street, Los Angeles and Returned to Respondent Marked "Not Known at This Address" [Tr. p. 18].

On July 17, 1958, this *same original* letter was *personally* (manually) served on an officer of Petitioner [Tr. p. 18].

Petitioner filed its Petition *with the Tax Court* on *October, 3, 1958* [*without knowledge of the attempt,* by Respondent, to serve it by registered mail—Tr. p. 18] believing it was filing its Petition well within the 90 day prescribed period [Tr. pp. 3-13, 18-20 and 38].

The Respondent moved to dismiss Petitioner's Petition "for want of jurisdiction" [Tr. pp. 13-14 and 35-37].

Petitioner opposed the dismissal motion and filed an affidavit in support of its opposition [Tr. pp. 14-16]—*at this time Petitioner was still not aware of Respondent's attempt to serve by registered mail* [Tr. pp. 17-20].

On February 9, 1959 the Tax Court entered its Order of Dismissal [Tr. pp. 16-17].

On March 2, 1959 Petitioner moved to vacate the Order of Dismissal entered on February 9, 1959 [Tr. pp. 17-20].

In this March 2, 1959 motion Petitioner disclosed to the Tax Court:

(1) Its lack of knowledge of the registered letter;

(2) The fact it discovered the Respondent's reliance thereon *after* February 9, 1959;

(3) It was offering to prove that the registered letter of June 12, 1959 was *not* sent to the address of Petitioner *last known to the Respondent;*

(4) Its position that the Tax Court had jurisdiction because a Petition had been filed with the Tax Court within 90 days of the date Petitioner was *personally* served with the *same original* "90 day letter" [Tr. pp. 17-20].

On March 16, 1959 Petitioner moved for a Los Angeles hearing of its March 2, 1959 Motion [Tr. pp. 21-25].

On March 20, 1959 the Tax Court denied the Motion to Vacate *on the theory that it was immaterial* whether:

(1) Respondent mailed the registered letter to the alleged wrong address; or

(2) Petitioner failed to file its Petition with the Tax Court within 90 days of the mailing of said registered letter to the alleged right address.

The Tax Court held, in either event, it did *not* have jurisdiction and did *not* acquire jurisdiction when Petitioner filed its Petition (with the Tax Court) within 90 days from the date (July 17, 1958). Petitioner was *personally* served with the *same original* letter which had been sent (by registered mail)—June 12, 1958—to 3421 West 2nd Street, Los Angeles, California [Tr. pp. 25-27].

Further the Tax Court held that there was no need of a hearing to determine which one of the two (2) reasons precluded jurisdiction [Tr. p. 27].

Petitioner moved for a rehearing on said order and it was denied on April 14, 1959 [Tr. pp. 28-29].

The present appeal was filed on May 4, 1959 [Tr. p. 39].

C. Statement of the Case.

This case presents, for the determination of this Court, the following questions:

(1) Did the Tax Court err in not granting a hearing for the purpose of determining whether the registered letter of June 12, 1958 was *not* sent to the "last known address" of Petitioner?

(2) If the only valid service on Petitioner was the *personal* service of July 17, 1958 did the Tax Court acquire jurisdiction when Petitioner filed its Petition (with the Tax Court) within 90 days of said date?

Petitioner contends:

(1) That it is most material for the Tax Court to hold a hearing to determine if the registered letter was sent to the address of Petitioner "last known to the Commissioner";

(2) That the Tax Court acquires jurisdiction if a Petition is filed with it within 90 days of *personal* service of a "90 day letter" which had been previously sent (by registered mail) to a wrong address.

D. Assignment of Errors.

The Petitioner assigns as error the following acts and omissions of the Tax Court of the United States:

(1) Dismissing, on February 9, 1959, Petitioner's Petition for Redetermination on the alleged ground that the Tax Court lacked jurisdiction because Petitioner failed to file its Petition for Redetermination within ninety (90) days of the date the statutory Notice of Deficiency was mailed.

(2) Refusing to vacate said Order of Dismissal after its attention was called to the fact that it was Petitioner's contention that the statutory Notice of Deficiency in question was not mailed to Petitioner's address "last known" to Respondent.

(3) Refusing to hold a hearing, as requested by Petitioner, to hear evidence offered by Petitioner which would prove that the statutory Notice of Deficiency, in question, was not mailed to the last known address of Petitioner.

(4) In deciding that it made no difference whether it "lacked jurisdiction" because, on the one hand, Petitioner failed to file its Petition within ninety (90) days of June 12, 1958, or, on the other hand, because Respondent failed to mail the statutory Notice of Deficiency to the address of Petitioner last known to Respondent.

(5) In deciding that the Tax Court can only acquire jurisdiction in matters of this type if the Commissioner of Internal Revenue sends a statutory Notice of Deficiency to a taxpayer "by registered mail" to taxpayer's last known address. Further, that it cannot acquire jurisdiction where the said statutory notice is "personally served" on taxpayer and the latter within ninety (90) days thereof filing a Petition for Redetermination with the Tax Court.

E. Argument.

I.

The Tax Court Failed to Recognize That the Tax Issue in Question Cannot Be Ultimately Decided Unless It Holds a Hearing and Then Decides Why It Does Not Have Jurisdiction.

If the Respondent mailed the "90 day letter," by registered mail, to Petitioner at its last address known to Respondent then the Tax Court never acquired jurisdiction because Petitioner failed to file a Petition, with the Tax Court, within 90 days of said mailing date.

Under the circumstances, the deficiencies in question would be effective and unreviewable.

However, if the Respondent did *not* send such letter (or deficiency notice) to Petitioner at its last address known to Respondent, then the deficiency notice is void and ineffective. As to the alleged deficiencies for the fiscal years ended November 30, 1954 and 1955 the statute of limitations has now run and Respondent is barred from assessing or collecting the same.

(In This Part of Our Argument We Are Assuming the Tax Court Is Correct in Holding That Such Deficiency Notices Cannot Be Served Other Than By Registered Mail)

Therefore, as stated by the Court in *D'Andrea v. Commissioner*, 263 F. 2d 904 (U. S. Court of Appeals, District of Columbia—Feb. 19, 1959) it is most important to *Petitioner and Respondent* for the Tax Court to decide whether it lacked jurisdiction because of tardy filing of a Petition in the Tax Court or because Respondent failed to send his deficiency notice to Petitioner at its address last known to Respondent.

Petitioner, in its Motion to Vacate Order of Dismissal [Tr. pp. 17-20] set forth all the basic facts pertinent to the question of the Tax Court's jurisdiction and in its Motion for a Hearing in Los Angeles (and supporting affidavit) it set forth the witnesses who would testify as to those pertinent facts if the hearing requested was granted [Tr. pp. 21-25].

Petitioner respectfully submits that this case should be remanded with directions to vacate the order dismissing the Petition for lack of jurisdiction because of late filing and to hold the hearing requested by Petitioner and then determine whether the "90 day letter" was mailed to Petitioner's address "last known to Respondent"—if not so mailed to enter an order dismissing for lack of jurisdiction because the notice of deficiency (90 day letter) was not legally given.

II.

The Tax Court Erred in Dismissing the Petition for Redetermination for Alleged Lack of Jurisdiction.

The Tax Court is of the opinion that, in order to give it jurisdiction two (2) events must transpire—to wit:

First The Respondent must issue a Notice of Deficiency (90 day letter) by mailing the same to taxpayer's "last known address" by *registered mail;* and

Second: Taxpayer must, within 90 days of the date of mailing such registered letter, file (by mailing) a Petition for Redetermination with the Tax Court.

The denial of the Motion to Vacate Order of Dismissal [Tr. pp. 25-27] clearly discloses that the Tax Court is of the opinion that it cannot acquire jurisdiction if

(1) the Respondent (within the statute of limitations) *personally* serves a taxpayer with a notice of deficiency and (2) the taxpayer files his petition within 90 days of said service.

This Court, in *Boren v. Riddell,* 241 F. 2d 670 (Feb. 19, 1957) held that Congress did not intend that the Commissioner could only serve his Notice of Deficiency *by registered mail.*

In that case this Court clearly decided that such notice could also be served "manually" (personal service) or by "ordinary mail."

In the present case Petitioner did *not* receive the Notice of Deficiency sent on June 12, 1958, by registered mail. Respondent knew this (when letter returned maked "not known at this address") and, on July 17, 1958, *personally* (or manually) served the same original Notice (or 90 day letter) on Petitioner (who was not aware of the mailing and return of the registered letter).

Within 82 days of such *manual* service Petitioner filed its Petition for Redetermination with the Tax Court.

Petitioner respectfully submits that, within the principles established by the *Boren* case, *supra,* and under Sections 6212 and 6213 of the Internal Revenue Code of 1954 the Tax Court of the United States erroneously decided that it could not have jurisdiction of the present matter.

Petitioner respectfully submits that the case should be remanded with directors to hold the hearing requested by the Petitioner and then determine whether it (Tax Court) does *not* have jurisdiction because the notice was properly sent by registered letter to Petitioner's "last known address" and Petitioner did not file its Petition

within 90 days of such mailing, or it *does* have jurisdiction because the Notice of Deficiency was finally and properly served *manually* and Petitioner filed its Petition within 90 days of such manual service.

F. Conclusion.

Petitioner appreciates that it is asking for somewhat inconsistent "directions" in the two (2) foregoing arguments but believes that such requests are necessary because of its uncertainty as to whether this Court will follow the Tax Court or the rule of the *Boren* case in its interpretation and application of Section 6212 of the 1954 Internal Revenue Code.

Petitioner respectfully submits that in the light of the facts offered to be proved by the Motion to Vacate Order of Dismissal [Tr. pp. 17-20] and by the Motion For Los Angeles Hearing (and affidavit in support thereof) —[Tr. pp. 21-25] and for the reasons stated by the *D'Andrea* case, *supra,* the case should be remanded to the Tax Court for the purpose of holding the Hearing requested.

After "directing" the holding of such Hearing Petitioner respectfully submits that further "directions" should be consistent with this Court's decision in the *Boren* case, *supra.*

Dated: Los Angeles, California
October 16, 1959

Respectfully submitted,

James J. Arditto,

Attorney for Petitioner.

No. 16,509

In the United States Court of Appeals for the Ninth Circuit

ROSEWOOD HOTEL, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of An Order of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

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COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of An Order of the Tax Court of the United States

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The Tax Court did not render an opinion.

JURISDICTION

This petition for review (R. 29-35) involves a deficiency in federal income and excess profits tax and penalties for the taxable years ending November 30, 1954, and November 30, 1955 (R. 70). On June 12, 1958, the Commissioner of Internal Revenue forwarded by registered mail to the taxpayer a notice of deficiency in the total amount of $48,305.79. (R. 7, 9, 13, 26.) The taxpayer filed a peti-

tion with the Tax Court on October 7, 1958, for redetermination of that deficiency. (R. 3-13, 38.) The order of the Tax Court dismissing the petition for lack of jurisdiction was entered on February 9, 1959. (R. 16-17.) The order of the Tax Court denying the taxpayer's motion to vacate the order of dismissal was entered on March 20, 1959. (R. 25-27.) The case is brought to this Court by petition for review filed on May 4, 1959. (R. 29-35.) The jurisdiction of this Court is invoked under Section 7482, Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the Tax Court correctly dismissed the petition for redetermination for lack of jurisdiction because the petition was not filed within the 90-day period after the notice of deficiency was mailed as prescribed by Section 272(a)(1) of the Internal Revenue Code of 1939 and Section 6213(a) of the Internal Revenue Code of 1954.

STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations appear in the Appendix, *infra.*

STATEMENT

The Commissioner determined a deficiency in the taxpayer's income and excess profits tax and penalties for the taxable years ending November 30, 1954, and November 30, 1955. (R. 7.) A notice of deficiency was sent by registered mail to the taxpayer's last

known address of 3421 West Second Street, Los Angeles 4, California, on June 12, 1958. (R. 7, 13, 26.) The notice was returned undelivered. The taxpayer alleges that the notice was personally served upon Nathan Stein on July 17, 1958, at the Temple Hospital in Los Angeles by an Internal Revenue Agent. (R. 3-4.) The ninetieth day after the notice of deficiency was mailed to the taxpayer was September 10, 1958, which was neither a Saturday, Sunday, nor legal holiday in the District of Columbia. The envelope containing the petition for redetermination was postmarked October 3, 1958, which was the 113th day after the notice of deficiency was mailed. (R. 13.) The petition was received and filed by the Tax Court on October 7, 1958, the 117th day after the notice of deficiency was mailed. (R. 13-14.)

The Commissioner filed a motion to dismiss the petition on the ground that the Tax Court lacked jurisdiction since the taxpayer failed to file the petition within 90 days after the notice of deficiency was mailed. (R. 13-14.) The Tax Court granted the Commissioner's motion to dismiss (R. 16-17), denied the taxpayer's motion to vacate the order of dismissal (R. 25-27), and denied the motion for a rehearing on the motion to vacate (R. 28-29).

SUMMARY OF ARGUMENT

When the Commissioner sends a notice of deficiency in accordance with the applicable provisions of the Internal Revenue Code the 90-day period within which to file a petition for redetermination

with the Tax Court commences on the date the notice of deficiency is mailed. On June 12, 1958, the Commissioner sent to the taxpayer at its last known address a notice of deficiency by registered mail. This notice complied in all respects with the statutory requirements. It is immaterial that the notice was returned undelivered because actual receipt of the notice is not required in order that the statutory filing period commence. Nor is it material that the taxpayer had ceased doing business, because under Section 272(k) of the Internal Revenue Code of 1939 and Section 6212(b)(1) of the Internal Revenue Code of 1954, sending the notice to the last known address is sufficient, in case of a corporation, as here, even though it has terminated its existence. The only exception is in the instance of a notice to the Commissioner of the existence of a fiduciary relationship. There was no notice of a fiduciary relationship in this case. The 90-day period within which to file a petition began on the mailing date of June 12, 1958, and expired on September 10, 1958. Filing the petition on October 7, 1958, therefore, was untimely.

The Tax Court is a tribunal with limited jurisdiction, and the filing requirement is jurisdictional. There must be strict compliance with the statutory jurisdictional requirements, and there is no authority "to relieve the taxpayer from the clear jurisdictional requirements of the law." The extent to which the requirement of filing the petition by delivery to the Tax Court has been temporized is set forth in Section 7502 of the Internal Revenue Code of 1954. That

section is not apposite here because the postmarked date on the envelope containing the petition is not within the prescribed 90-day period.

Since the petition was untimely filed on October 7, 1958, the Tax Court did not acquire jurisdiction. Therefore, the Tax Court correctly dismissed the petition.

ARGUMENT

The Tax Court Correctly Dismissed the Petition for Lack of Jurisdiction Because the Petition Was Not Filed Within the Prescribed 90 Days

A. *The notice of deficiency was properly mailed to the taxpayer at its last known address and the 90-day period for filing the petition commenced on the mailing date of June 12, 1958.*

Section 272(a)(1) of the Internal Revenue Code of 1939 [1] (Appendix, *infra*) requires the mailing of a notice of deficiency to the taxpayer as a prerequisite to assessment if the Commissioner determines there is a deficiency in income tax. The section authorizes sending the notice of deficiency by regis-

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[1] Section 272 of the Internal Revenue Code of 1939 applies to the taxable year ending November 30, 1954, while Sections 6212 and 6213 of the Internal Revenue Code of 1954 apply to the taxable year ending November 30, 1955. See Section 7851(a)(6) of the Internal Revenue Code of 1954. Since the pertinent portions of Section 272 of the 1939 Code and Sections 6212 and 6213 of the 1954 Code (Appendix, *infra*) (relating to the requirement of sending a notice to the last known address of the taxpayer and of filing a petition within 90 days after the notice is mailed) are substantially the same, references herein will be made solely to the 1939 Code for the sake of brevity.

tered mail, and Subsection (k) (Appendix, *infra*) states that in the absence of notice to the Commissioner of a fiduciary relationship, mailing the notice of deficiency "to the taxpayer at his last known address, shall be sufficient for the purposes of this chapter even if such taxpayer * * * in the case of a corporation, has terminated its existence." The ninety-day period within which a petition for redetermination may be filed with the Tax Court is computed from the date the notice of deficiency is mailed. Section 272(a)(1). The Commissioner determined deficiencies in income tax in this case for the taxable years ending November 30, 1954 and November 30, 1955, and on June 12, 1958, a notice of deficiency was mailed by registered mail to the taxpayer correctly addressed to 3421 West Second Street, Los Angeles, California. This was the last known address of the taxpayer. This notice was returned undelivered. That the notice of deficiency is not actually received does not postpone the beginning date of the 90-day period because the statute does not require actual receipt. Section 272(a)(1) and (k); *Gregory* v. *United States*, 57 F. Supp. 962 (C. Cls.), certiorari denied, 326 U. S. 747; *Helfrich* v. *Commissioner*, 25 T. C. 404. Thus, in accordance with the statute, the 90-day period within which to file the petition for redetermination commenced on June 12, 1958, the date the notice of deficiency was properly mailed to the taxpayer's last known address.

This Court has pointed out in *Boren* v. *Riddell*, 241 F. 2d 670, 672, that Section 272 was designed to facilitate and provide for, *as far as practicable*,

actual delivery to taxpayers of the Commissioner's notices of deficiency. The obvious purpose of the statute was to put a taxpayer on notice of the administrative determination and to allow him a sufficient opportunity to file a petition for redetermination with the Tax Court if he chooses. *Dolezilek* v. *Commissioner*, 212 F. 2d 458 (C.A. D.C.); *Boren* v. *Riddell*, supra. See also H. Rep. No. 179 68th Cong., 1st Sess., pp. 62, 64 (1924) (1939-1 Cum. Bull. (Part 2) 241, 258, 260); S. Rep. No. 398 68th Cong., 1st Sess. pp. 30-31, 32-33 (1924) (1939-1) Cum. Bull. (Part 2) 266, 287); H. Rep. No. 1, 69th Cong., 1st Sess. pp. 10-11 (1925) (1939-1) Cum. Bull. (Part 2) 315, 321-322); S. Rep. No. 52, 69th Cong., 1st Sess., pp. 26-27 (1926) (1939-1) Cum. Bull. (Part 2) 361, 368). The administrative practice of seeking to accomplish the purpose of the statute by achieving actual notice is exemplified by telephonic contact as in *D'Andrea* v. *Commissioner*, 263 F. 2d 904 (C.A. D.C.), manual delivery as in *Dolezilek* v. *Commissioner*, *supra*, and *Goldstein* v. *Commissioner*, 22 T. C. 1233, and remailing as in *Teel* v. *Commissioner*, 248 F. 2d 749 (C.A. 10th), and *Boren* v. *Riddell*, *supra*.

Nondelivery of the notice mailed to 3421 West Second Street was not due to the Commissioner's fault. The Commissioner fulfills his duty when he complies with the statute by sending the notice to the last known address. Though the taxpayer *now* asserts in its argument (Br. 7-8) that the notice was not sent to the last known address of the taxpayer, significantly the taxpayer alleged and set forth in

paragraph I of its petition for redetermination as being its address—the identical address (3421 West Second Street) used by the Commissioner. (R. 3.) This petition which was filed on October 7, 1958 was duly verified under oath and also bears the signature of the present counsel in this case.

The case of *D'Andrea* v. *Commissioner*, 263 F. 2d 904 (C.A. D.C.), which is cited by the taxpayer (Br. 7, 10), is distinguishable because in that case the Commissioner had formal notice of the taxpayer's last address in the power of attorney in his files, but the registered notice was not mailed to that address. The taxpayer does not claim that formal notice of a change of address was given to the Commissioner. Certainly such informal notice as taxpayer now undertakes to say was given to the revenue agents, even if given, is not sufficient to change the record address for purposes of sending a notice of deficiency.[2] See *Goldstein* v. *Commissioner*, 22 T.C. 1233; *Teel* v. *Commissioner*, 248 F. 2d 749 (C.A. 10th); *Williams* v. *United States*, 264 F. 2d 227 (C.A. 6th). The Commissioner should not be charged

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[2] The taxpayer alleges (R. 18, 20):

> (4) That during the period of approximately December, 1957, through March 15, 1958, Revenue Agents Goddard and Keller made an audit of Petitioner, for the fiscal taxable years ended November 30, 1954, and November 30, 1955, and during the course of said audit and at that time said Revenue Agents were told that:
>
> * * * *
>
> (g) * * * any 90-day letter for Petitioner should be mailed or delivered to Nathan Stein at Temple Hospital on Hoover Street in Los Angeles.

with notice of a change of address by a mere verbal reference allegedly made sometime during the course of an audit extending over the period December 1957 through March 15, 1958 to an address other than that shown in the Commissioner's administrative files.[3] The notice of a change of address which was given to a Collector (now District Director) in *Trefry* v. *Commissioner*, 10 B.T.A. 134, and charged to the Commissioner and which was given to an acting Deputy Commissioner in *Wyoming Central Ass'n.* v. *Commissioner*, 8 B.T.A. 1064 was entirely different from the type of notice claimed to be given by the taxpayer here. See also *Gregory* v. *United States*, 57 F. Supp. 962 (C. Cls.), certiorari denied, 326 U.S. 747. Moreover, the taxpayer's assertion in its motion to vacate the order of dismissal (R. 18-20) that the agents were informed of a particular address to which to send the notice of deficiency, is belied by the fact, above adverted to, that the taxpayer recited in its verified petition for redetermination *as its address* the same address to which the notice of deficiency was mailed, namely, 3421 West Second Street, Los Angeles 4, California.[4]

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[3] It should also be noted that taxpayer's change of address contention was made for the first time after the Tax Court had entered its original order dismissing taxpayer's petition for lack of jurisdiction. (R. 16-20.)

[4] The taxpayer complains that it was not aware of the mailing and return of the notice of deficiency. (Br. 9.) But, on the other hand, the taxpayer admits that it received the original notice dated June 12, 1958 (Br. 3-9), and in its petition for redetermination the taxpayer recited that

B. *the requirement of filing a petition with the tax court within the prescribed 90-day period is jurisdictional*

The Tax Court is a tribunal of limited jurisdiction (*Lasky* v. *Commissioner*, 352 U.S. 1027; *Commissioner* v. *Gooch Milling & Elevator Co.*, 320 U.S. 418) and the filing requirement is jurisdictional (*Mindell* v. *Commissioner*, 200 F. 2d 38 (C.A. 2d); *Galvin* v. *Commissioner*, 239 F. 2d 166 (C.A. 2d)).[5]

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the notice of deficiency was dated June 12, 1958 (R. 3). That the notice of deficiency was received on July 17, 1958, more than a month after its date (June 12, 1958) would certainly arouse curiosity as to the cause of delay. This is especially so since the notice was delivered personally. This is not a case like *Eppler* v. *Commissioner*, 188 F. 2d 95 (C.A. 7th), where the registered notice of deficiency which was sent to a "former" address was re-registered and sent to taxpayer's business address where he received it without any notice of the first mailing. In the *Eppler* case, the court said (p. 98):

> But the taxpayer insists, and we think with justification that by mailing out the notice of deficiency the second time by registered mail the taxpayer was given no notice of the first mailing and that he was therefore misled into believing that he had ninety days from the second mailing within which to file his appeal. The Commissioner should not be permitted to defeat the purpose of this remedial statute by so misleading the taxpayer.

[5] Accord: *Underwriters, Inc.* v. *Commissioner*, 215 F. 2d 953 (C.A. 3d); *Lingham-Pritchard* v. *Commissioner*, 242 F. 2d 750 (C.A. 3d), certiorari denied, 355 U.S. 846, rehearing denied, 355 U.S. 886; *Kiker* v. *Commissioner*, 218 F. 2d 389 (C.A. 4th); *Poyner* v. *Commissioner*, 81 F. 2d 521 (C.A. 5th); *Worthington* v. *Commissioner*, 211 F. 2d 131 (C.A. 6th); *Eppler* v. *Commissioner*, 188 F. 2d 95 (C.A. 7th); *DiProspero* v. *Commissioner*, 176 F. 2d 76 (C.A. 9th);

There must be strict compliance with the statutory jurisdictional requirements (*Stebbins' Estate* v. *Helvering*, 121 F. 2d 892 (C.A. D.C.)), and no matter how apparently inequitable the situation, there is no authority "to relieve the taxpayer from the clear jurisdictional requirements of the law" (*Rich* v. *Commissioner*, 250 F. 2d 170, 175 (C.A. 5th)).

It is significant, we think, that in enacting Section 7502 of the Internal Revenue Code of 1954 (26 U.S.C. 1958 ed., Sec. 7502), presumably with knowledge of the decisions in such cases as *Poyner* v. *Commissioner*, *supra; Stebbins' Estate* v. *Commissioner*, *supra*, and *DiProspero* v. *Commissioner*, 176 F. 2d 76 (C.A. 9th) (where a delay in filing was occasioned by the mode of delivery though the selection of such mode was reasonable) Congress failed to extend equitable considerations with respect to determining whether a petition with the Tax Court was filed in time beyond consideration of the date of mailing as indicated by the postmark. See *Rich* v. *Commissioner*, *supra; Bloch* v. *Commissioner*, 254 F. 2d 277 (C.A. 9th); *Madison* v. *Commissioner*, 28 T.C. 1304. Section 7502(a) of the Internal Revenue Code of 1954 treats timely mailing (as shown by the postmark) as timely filing. The section is effective for mailing which occurs after August 16, 1954, as here, but Section 7502(a) provides:

Ryan v. *Alexander*, 118 F. 2d 744 (C.A. 10th); *Teel* v. *Commissioner*, 248 F. 2d 749 (C.A. 10th); *Lewis-Hall Iron Works* v. *Blair*, 23 F. 2d 972 (C.A. D.C.), certiorari denied, 277 U.S. 592.

> This subsection shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of the claim, statement, or other document, * * *

The postmark date here was October 3, 1958, which was nearly a month *after the end of the 90-day period.* Consequently, Section 7502 is not applicable in this case. We submit that Section 7502 demonstrates Congress' choice and plainly delimits whatever relaxation of the prior strict delivery requirement was intended. Section 7502(a) does not otherwise permit an extension of the 90-day period predicated upon either hardship or equity. See House Hearings on General Revenue Revision (1953), pp. 1344, 1358; Senate Hearings on Internal Revenue Code of 1954 (1954), pp. 482, 1325, 2283; H. Rep. No. 1337, 83d Cong., 2d Sess., p. 434 (3 U.S.C. Cong. & Adm. News (1954) 4017); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 615 (3 U.S.C. Cong. & Adm. News (1954) 4621, 5266).

To file a petition with the Tax Court pursuant to Section 272(a)(1) of the 1939 Code means actual delivery of the petition to the Tax Court within the prescribed 90 days. *Jorgensen* v. *Commissioner*, 246 F. 2d 536 (C.A. 9th); *Galvin* v. *Commissioner*, 239 F. 2d 166 (C.A. 2d); *Lewis-Hall Iron Works* v. *Blair*, 23 F. 2d 972 (C.A. D.C.), certiorari denied, 277 U.S. 592. The taxpayer's petition here was not actually delivered until October 7, 1958. (R. 13-14.) This was 117 days after the notice of deficiency was mailed to the taxpayer and twenty-seven days after the end of the prescribed 90-day period. The peti-

tion, therefore, was not timely filed in accordance with the actual delivery requirement of Section 272 (a)(1) and the Tax Court did not acquire jurisdiction.

The Tax Court dismissed the petition on the ground that the record and evidence showed that the petition was not filed within the time prescribed by the statute and that it lacked jurisdiction. (R. 16-17.) In its order on the taxpayer's motion to vacate the order of dismissal, the Tax Court interpreted its order of dismissal and stated (R. 25-26):

> The petitioner filed a document in opposition to the motion and, thereafter, hearing on the motion was held at which time *facts were proven showing that the petition had not been filed within 90 days of the date on which the notice of deficiency had been mailed to the petitioner by registered mail as required by law* and the Court entered an order on February 9, 1959, dismissing the case for lack of jurisdiction. (Italics added.)

The record shows that the Tax Court's finding that the notice was mailed as required by law (to the taxpayer's last known address) and its dismissal of the petition as untimely filed were correct. The reference in the Tax Court's order on the taxpayer's motion to vacate the order of dismissal (R. 26-27) to some other ground as a possible basis for also denying jurisdiction was therefore unnecessary and, accordingly does not constitute reversible error. See *Helvering* v. *Gowran*, 302 U.S. 238, 245-6, rehearing denied, 302 U.S. 781; *Hormel* v. *Helvering*, 312 U.S. 522, 558.

The taxpayer urges the proposition that it is entitled to compute the filing period of 90 days from the date of actual receipt of the notice of deficiency. (Br. 9-10.) This proposition ignores the explicit statutory jurisdictional limitation of 90 days from the date the notice of deficiency was mailed to the taxpayer's last known address. There is no authority to extend that period by making it dependent upon actual receipt of the notice.

Implicit in the taxpayer's argument under point I (Br. 7-8) is the claim that the taxpayer will be deprived of a right to a judicial determination of the deficiency. This is simply an appeal for sympathy. It is the Congressional prerogative to establish the time within which a proceeding may be initiated in the Tax Court prior to payment of the deficiency. See *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1; *Federal Grain Co.* v. *United States*, 35 F. 2d 260 (W.D. Mo.); *Vance* v. *Vance*, 108 U.S. 514. That time has been established in Section 272, as modified by Section 7502 of the Internal Revenue Code of 1954, which does not permit an extension predicated upon either hardship or equity. The procedure in this case is consonant with the principles of our entire legal system; for in any case an aggrieved party's remedy may be barred upon the expiration of the period of limitations within which a remedy might have been pursued. 2 Cooley, Constitutional Limitations, pp. 760-765 (8th ed., 1927); Restatement of Judgments (1942), Sections 47(c), 49(a). In addition, a proceeding in the Tax Court is not necessarily the taxpayer's single recourse. See Sec-

tions 322(b)(1) and 3772(a) of the 1939 Code and Section 7422(a) of the 1954 Code. See also 28 U.S.C., Sections 1346(a) and 1491.

CONCLUSION

Mailing the notice of deficiency by registered mail on June 12, 1958, to the taxpayer's last known address complied with the statutory requirements and commenced the running of the prescribed 90 days within which to file a petition for redetermination with the Tax Court. The filing period expired on September 10, 1958. The petition was untimely filed on October 7, 1958. The Tax Court, therefore, did not acquire jurisdiction and properly dismissed the petition. The order of dismissal should be affirmed.

Respectfully submitted,

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NOVEMBER, 1959

APPENDIX

INTERNAL REVENUE CODE OF 1939:

Sec. 272 [as amended by Sec. 203, Act of December 29, 1945, c. 652, 59 Stat. 669]. PROCEDURE IN GENERAL.

(a)(1) *Petition to the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding of distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint

notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address.

* * * *

(k) *Address for Notice of Deficiency.*—In the absence of notice to the Commissioner under section 312(a) of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by this chapter, if mailed to the taxpayer at his last known address, shall be sufficient for the purposes of this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(26 U.S.C. 1952 ed., Sec. 272.)

INTERNAL REVENUE CODE OF 1954:

Sec. 6212 NOTICE OF DEFICIENCY.

(a) *In General.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by registered mail.

(b) *Address for Notice of Deficiency.*—

(1) *Income and gift taxes.*—In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by chapter 1 or 12, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of such chapter and this chapter even if such taxpayer is deceased, or is

under a legal disability, or, in the case of a corporation, has terminated its existence.

* * * *

(26 U.S.C. 1958 ed., Sec. 6212.)

Sec. 6213 RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) *Time for Filing Petition and Restriction on Assessment.*—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. * * *

* * * *

(26 U.S.C. 1958 ed., Sec. 6213.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

Sec. 39.272-1 *Assessment of a deficiency.* (a) If the Commissioner determines that there is a deficiency in respect of the income tax imposed by chapter 1 (see sections 57 and 271),

the Commissioner is authorized to notify the taxpayer of the deficiency by registered mail. If a joint return has been filed by husband and wife the Commissioner may, unless he has been notified by either spouse that a separate residence has been established, send either a joint or separate notice of deficiency, that is, a duplicate original of the joint notice, must be sent by registered mail to each spouse at his or her last known address. The notice to the Commissioner provided for in section 272(a), relating to separate residences, should be addressed to the Commissioner of Internal Revenue, Washington 25, D. C., attention Audit Services Branch, Audit Division. Within 90 days after notice of the deficiency is mailed (or within 150 days after mailing in the case of such a notice addressed to a person outside the States of the Union and the District of Columbia), as provided in section 272(a), a petition may be filed with the Tax Court of the United States for a redetermination of the deficiency. In determining such 90-day or 150-day period, Saturday, Sunday, or a legal holiday in the District of Columbia is not to be counted as the 90th day or 150th day. Except as stated in paragraphs (b), (c), (d), (e), and (f) of this section, no assessment of a deficiency in respect of a tax imposed by chapter 1 shall be made until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. As to the date on which a decision of the Tax Court becomes final, see section 1140.

* * * *

(g) * * * If the Commissioner mails to the taxpayer notice of a deficiency, and the taxpayer files a petition with the Tax Court within the prescribed period, the Commissioner is barred from determining any additional deficiency for the same taxable year except in the case of fraud and except as provided in section 272(e), relating to the assertion of greater deficiencies before the Tax Court, or in section 273, relating to jeopardy assessments.

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No. 16509

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROSEWOOD HOTEL, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition to Review a Decision of the Tax Court of the United States.

PETITIONER'S REPLY BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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ROSEWOOD HOTEL, INC.,

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF.

A. FOREWORD.

Inasmuch as we are dealing with proposed deficiencies for the fiscal years ended November 30, 1954 and November 30, 1955, it is true (Sec. 7851(a)(6) of IRC 1954) that we are concerned with both the old (IRC 1939) and new (IRC 1954) Internal Revenue Codes (called IRC). However, as pointed out by Respondent in a footnote, at page 5, to his brief, the pertinent sections (272 of the 1939 Code and 6212 and 6213 of the 1954 Code) are substantially the same.

Petitioner, for brevity's sake, referred to the 1954 Code Sections while Respondent refers to the 1939 Code Sections (See pp. 16-18 of Resp. Reply Br.).

Respondent devotes considerable attention to Section 7502(a) of IRC of 1954 which treats timely *mailing* of a Petition for Redetermination as timely *filing-provided* the *mailing* occurs prior to or on the 90th day after a

deficiency notice is *properly* mailed. (See Resp. Reply Br., pp. 4-5, 11-12.)

In this case, Petitioner readily admits that the Tax Court did *not* have jurisdiction *if* Respondent mailed his "90 day letter" to the "last known address" of Petitioner.

Petitioner is *not* appealing "for sympathy" (see p. 14 of Resp. Br.) and understands that the Tax Court is a tribunal of limited jurisdiction (p. 10 of Resp. Br.).

However, the Respondent has failed completely to grasp that Petitioner is contending that the "Pleadings" in this case [Tr. pp. 17-25] raised the question whether Respondent mailed his Notice of June 12, 1958, to Petitioner's address last known to Respondent.

The Tax Court fully understood the effect *of these pleadings* because in its opinion *of March 20, 1959* [Tr. pp. 25-27] that Court said, in effect, even *if* the Petitioner proves that the June 12, 1958 Notice was mailed to an erroneous address *nevertheless* the Court did *not* have jurisdiction because the Respondent's *personal* (manual) service of July 17, 1958 was not the *type of service* that could give the Tax Court jurisdiction.

Therefore, the Tax Court concluded that a hearing to determine whether these "pleadings" could be sustained by Petitioner was not necessary or called for.

Petitioner respectfully disagrees with the Tax Court because:

(1) If the Hearing proved that the 90-day letter was *improperly* mailed, then the Petition should have been dismissed (and for *that* reason)—unless

(2) The Hearing proved that there was personal service on July 17, 1958, and the Tax Court decided to follow the decision of this Court in *Boren v. Riddell,* 241 F. 2d 670.

If the Tax Court, after such Hearing, found *improper* mailing of the 90-day letter (but personal service on July 17, 1958), then it had the following choices:

(a) Dismiss Petition on theory that Respondent did not comply with Sections 272 (K) (IRC 1939) or 6212 (b)(1) (IRC 1954), and hold that it could not acquire jurisdiction because of personal service and the filing of a Petition within 90 days thereof; or

(b) Vacate its Order granting Respondent's Motion to Dismiss by relying on the *Boren* case, *supra,* and proceed to hear the case (including any special defenses such as Statute of Limitation).

The consequences to Petitioner (as pointed out by *D'Andrea v. Commissioner,* 263 F. 2d 904) are considerably different if:

(a) The Tax Court and this Court hold that the former Court can only acquire jurisdiction by the Respondent mailing a Registered Notice to the right address; or

(b) This Court holds, as in the *Boren* case, *supra,* that the Tax Court can acquire jurisdiction by the Respondent effecting personal service and Petitioner mailing his Petition within 90 days of such service.

A hearing is necessary to determine *if* the 90-day letter was mailed, by Respondent, to the right address. If it is concluded, after hearing, that it was so mailed, then Petitioner can only pay the taxes and sue for refund thereof. (Section 7422(a) of IRC 1954.)

If it is concluded, at such hearing, that the Notice (90-day letter) was sent to the *wrong* address, then the

Respondent cannot attempt to collect the taxes in question unless this Court disagrees with the Tax Court (and Respondent) and follows the rule of the *Boren* case, *supra,* and holds the Tax Court acquired jurisdiction by the personal service of July 17, 1958, and the mailing (and receipt) of the Petition within 90 days thereof.

B. ARGUMENT.

The Tax Court Erred in Dismissing the Petition Without Holding a Hearing.

I.

A Hearing Is Necessary to Determine Whether the Notice of Deficiency Was Properly Mailed by Respondent.

The pertinent Sections of IRC of 1939 and 1954 require that a Notice of Deficiency be mailed to a taxpayer "at his last known address". (Sec. 272(K) and Sec. 6212(b)(1), respectively—See p. 17 of Resp. Br.)

Both parties to this appeal agree on this statutory requirement—if service is attempted by registered mail.

Petitioner, after realizing (*subsequent* to the time it received the Court's order of dismissal of February 9, 1959) that Respondent was relying on the fact that he had mailed the June 12, 1958 notice to a *former* address of Petitioner, filed its various motions with the Tax Court wherein it "alleged" that its address "last known to Respondent" was c/o Nathan Stein, Temple Hospital, Hoover Street, Los Angeles, and asked the Tax Court to grant it a hearing to determine this "basic fact". [Tr. pp. 17-25.]

Petitioner respectfully submits that the issue presented by these "pleadings" cannot be decided until a hearing is scheduled by the Tax Court and the "facts" ascertained.

Respondent seems to argue that a taxpayer can only change (for this purpose) his address by formal written

communication to a District Director or to Respondent or one of his deputies.

The only statutory provision Petitioner was able to find on this point is that contained in Sections 272(K) and 6212(b)(1) and only relating to the existence of a fiduciary relationship—which is not pertinent herein.

Petitioner respectfully submits that if it proves its allegations relative to informing revenue agents—WHILE THEY WERE AUDITING TAXPAYER FOR THE YEARS IN QUESTION—it will have established that Respondent did *not* mail the notice in question "to taxpayer at his last known address".

The notice of change given herein was not the general vague type of notice referred to in the cases cited by Respondent at bottom of page 8 of his Brief.

II.

While the Requirement of Filing a Petition Within 90 Days Is Jurisdictional, This Requirement Is Satisfied if It Is Filed Within 90 Days of Personal Service (After Registered Mail Is Sent to Wrong Address).

The facts in this case are fairly simple—to wit:

The Respondent mailed (Registered) a notice of deficiency to Petitioner on June 12, 1958, to 3421 West Second Street, Los Angeles 4, California.

Taxpayer alleges that prior to June 12, 1958, it notified Respondent (through its agents) that any such notice should be mailed to another address. [Tr. 17-25.]

On July 17, 1958 (with the June 12, 1958 registered letter having been returned marked "Not known at this address") the Respondent had his agents personally serve this *same* notice on taxpayer.

On October 3, 1958, taxpayer mailed its Petition for Redetermination to the Tax Court (unaware of the mailing of the registered letter of June 12, 1958), and the Petition was received on October 7, 1958. (Both *mailing* and *receipt* (by Tax Court) dates within 90 days of *July 17, 1958.*)

Respondent, at pages 10-15 of his Reply Brief, agrees with the Tax Court that it can only acquire jurisdiction if:

(a) Notice of Deficiency is mailed (registered) to last known address of taxpayer; and

(b) Petitioner mails his Petition within 90 days of date notice is so mailed.

Contrary to Petitioner's position—Respondent states Petitioner "urges the proposition that it is entitled to compute * * * 90 days from date of actual receipt of notice * * *" (p. 14, Resp. Reply Br.)—When Notice Is Mailed to Taxpayer's Last Known Address.

It is only where—as in the present case—the Notice is Not mailed to taxpayer's last known address but is subsequently (or for the first time) personally served that Petitioner believes the *Boren* case, *supra,* holds that the Tax Court has jurisdiction *if* a taxpayer, within 90 days thereof, mails his Petition to the Tax Court.

Respondent assumes throughout his Reply Brief (and particularly at pages 10-15 of his Reply Br.) that the Notice of Deficiency was mailed to "taxpayer's last known address".

If that was conceded (and the opposite Not pleaded), Petitioner would also concede that the Tax Court did not have jurisdiction—and Petitioner's only remedy would be to pay the tax and sue for refund.

C. CONCLUSION.

Petitioner respectfully submits that the Tax Court should be directed to hold a hearing to ascertain whether the notice in question was mailed to the "last known address of taxpayer," and, if it then concludes that the 90-day letter was not so mailed, to then proceed in accordance with the decision of this Court in *Boren v. Riddell,* 241 F. 2d 670—or dismiss the Petition for failure to mail the 90-day letter to the right address:

DATED: December 1, 1959.

Respectfully submitted,

JAMES J. ARDITTO,

Attorney for Petitioner.

No. 16509

United States
Court of Appeals
for the Ninth Circuit

ROSEWOOD HOTEL, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court of the United States

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—9-11-59

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

JAMES J. ARDITTO,
727 W. Seventh St.,
Los Angeles Calif.,

For the Petitioner.

CHARLES K. RICE,
Asst. Atty. General,
Dept. of Justice, Tax Division;

MEYER ROTHWACKS,
Atty., Dept. of Justice,
Dept. of Justice, Tax Division,
Washington 25, D.C.,

For the Respondent.

The Tax Court of the United States

Docket No. 77084

ROSEWOOD HOTEL, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW OF DEFICIENCY DETERMINATION

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Respondent in his Notice of Deficiency (Internal Revenue Service Symbols A: R: 90D: CTF) stamp-dated June 12, 1958, and as a basis of its proceeding alleges as follows:

I. The Petitioner is a corporation, with its principal office located in the City of Los Angeles, State of California, to wit: 3421 West Second Street, Los Angeles 4, California.

The returns of Petitioner herein involved for the taxable years ended November 30, 1954, and November 30, 1955, were filed with the District Director of Internal Revenue at Los Angeles, California.

II. The Notice of Deficiency (a copy of which is marked "Exhibit A" and attached hereto) was

personally served on Petitioner on July 17, 1958, in accordance with the acknowledgment of such service so dated and signed by R. A. Goddard, Revenue Agent.

III. The taxes and penalties in controversy, and for the specific years ending, are set out as follows:

Year Ended: 11-30-54.
Type of Tax: Income and Excess Profits Tax.
Deficiency: $42,220.46.
5% Penalty: $2,111.02.
Year Ended: 11-30-55.
Type of Tax: Income Tax.
Deficiency: $3,785.06.
5% Penalty: $189.25.

That the total amount of taxes and penalties in controversy is the sum of $46,005.52 in income and excess profits taxes and $2,300.27 of 5% penalty.

IV. The determination of the tax set forth in said Notice of Deficiency is based upon the following errors:

(a) The Commissioner erred in failing to determine that any Notice of Deficiency for the taxable year ended November 30, 1954, was barred by the three-year statute of limitations prescribed by the Internal Revenue Code of 1939 and 1954.

(b) The Commissioner erred in determining that any alleged underpayment of tax was due to negligence or intentional disregard of rules

and regulations (without intent to defraud) within the purview of Sec. 293(a) or Sec. 6653(a) of the Internal Revenue Codes of 1939 and 1954.

(c) The Commissioner erred in determining that during the fiscal year ended November 30, 1954, Petitioner allegedly erroneously deducted the sum of $96,000.00 as "lease expense."

(d) The Commissioner erred in determining that for the fiscal year ended November 30, 1955, Petitioner allegedly erroneously deducted the following items:

Lease Expense	$16,000.00
Net Operating Loss	$ 4,973.62

(e) The Commissioner erred in determining that there is due from Petitioner any deficiency of tax or penalty during either of the fiscal years ended November 30, 1954, or November 30, 1955.

V. The facts upon which Petitioner relies as a basis for this proceeding are as follows:

(a) The fundamental point of dispute between Petitioner and Respondent is whether the Notice of Deficiency for the fiscal year ended November 30, 1954, which was personally served on Petitioner on July 17, 1958, was barred by the pertinent three-year statute of limitations prescribed by the Internal Revenue Code.

(b) That the deductions for lease expense claimed by Petitioner for the fiscal years ended

November 30, 1954, and November 30, 1955, and which are proposed to be disallowed by the Respondent herein, can be supported by Petitioner and Petitioner can establish that such deductions were properly claimed.

(c) Petitioner's returns for the fiscal years ended November 30, 1954, and November 30, 1955, have been correctly filed and correctly set out Petitioner's correct taxable income and tax.

Wherefore, Petitioner prays this Court may hear the proceeding and redetermine the tax and penalty for the fiscal years ended November 30, 1954, and November 30, 1955, to be as follows:

Year Ended: 11-30-54.
Type of Tax: Income and Excess Profits Tax.
Amount of Tax: 0.
Amount of Penalty: 0.
Year Ended: 11-30-55.
Type of Tax: Income Tax.
Amount of Tax: 0.
Amount of Penalty: 0.

/s/ JAMES J. ARDITTO,
Of Waters, Arditto & Waters,
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed October 7, 1958.

Served October 8, 1958.

EXHIBIT A

U. S. Treasury Department
Internal Revenue Service
District Director
P. O. Box 231 - Main Office
Los Angeles 53, California

In Reply Refer to: A:R:90D:CTF.
MA 5-8971, Ext. 1210.

Rosewood Hotel, Inc.
3421 West Second Street
Los Angeles 4, California

Gentlemen:

You are advised that the determination of your income tax liability for the taxable years ended November 30, 1954, and November 30, 1955, discloses deficiencies in tax aggregating $46,005.52 and penalties aggregating $2,300.27, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia

in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the District Director of Internal Revenue, Audit Division, at the above address. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earliest.

Very truly yours,

RUSSEL C. HARRINGTON,
Commissioner.

By.....,
District Director of Internal Revenue.

Enclosures:
Statement.
IRS Publication No. 160.
Agreement Form.

STATEMENT

A:R:90D:CTF

Rosewood Hotel, Inc.
3421 West Second Street
Los Angeles 4, California

Tax Liability for the Taxable Years Ended:
November 30, 1954
November 30, 1955

Year Ended:	Liability	Assessed Deficiency		5% Penalty
11-30-1954 Income and excess profits tax	$42,220.46	None	$42,220.46	$2,111.02
11-30-1955 Income tax	3,785.06	None	3,785.06	189.25
Total	$46,005.52	None	$46,005.52	$2,300.27
Total				$48,305.79

In making this determination of your income and excess profits tax and penalty liability, careful consideration has been given to the report of examination dated May 15, 1958.

The five percent penalty shown herein is asserted in accordance with the provisions of section 293(a) of the Internal Revenue Code of 1939 and section 6653(a) of the Internal Revenue Code of 1954.

ADJUSTMENTS TO NET INCOME
Taxable year ended November 30, 1954

	Income tax Net Income	Excess Profits Net Income
Net income as disclosed by return (loss)	$(4,973.62)	$(4,973.62)
Unallowable deductions:		
(a) Lease Expense disallowed.....	96,000.00	96,000.00
(b) Adjustment for interest on borrowed capital (75% of $59.33)		44.50
Net income adjusted	$91,026.38	$91,070.88

EXPLANATION OF ADJUSTMENT

(a) It has been determined that the deduction claimed in your return for "Lease Expense" in the amount of $96,000.00 does not represent a proper deduction under the provisions of section 23 of the Internal Revenue Code of 1939.

(b) In computing excess profits net income an adjustment for interest on borrowed capital is made under the provisions of section 433(a) of the Internal Revenue Code of 1939.

COMPUTATION OF TAX
Taxable year ended November 30, 1954

Income tax:	
Net income adjusted	$91,026.38
Combined normal tax and surtax:	
52% of $91,026.38 less $5,500.00	$41,833.72
Normal tax and surtax	$41,833.72
Excess profits tax:	
Excess profits net income adjusted	$91,070.88
Less: Excess profits credit	25,000.00
Adjusted excess profits net income	$66,070.88
Tentative tax under Sec. 430(a) (1), I.R.C. of 1939:	
(1) 30% of $66,070.88	$19,821.26
Tentative tax under Sec. 430(a) (2), I.R.C. of 1939:	
(2) 18% of $91,070.88	$16,392.76
Tentative tax under Sec. 430(a) (3), I.R.C. of 1939:	
(3) 5% of $91,070.88	$ 4,553.54
Tentative excess profits tax (lesser of items (1), (2), and (3))	$ 4,553.54
Number of days in taxable year	365
Number of days before January 1, 1954	31
31/365 of $4,553.54	$ 386.74
Excess profits tax	$ 386.74

Summary

Total normal tax and surtax	$41,833.72
Excess profits tax	386.74
Correct income and excess profits tax liability	$42,220.46
Income and excess profits tax assessed:	
Original, account No. CN 107852	None
Deficiency of income and excess profits tax	$42,220.46
5% Penalty	$ 2,111.02

ADJUSTMENTS TO TAXABLE INCOME
Taxable year ended November 30, 1955

Taxable income as disclosed by return (loss)	$(8,356.75)
Unallowable deductions:	
(a) Lease Expense disallowed	16,000.00
(b) Net operating loss deduction	4,973.62
Taxable income adjusted	$12,616.87

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that the deduction claimed in your return for "Lease Expense" in the amount of $16,000.00 does not represent a proper deduction under the provisions of the Internal Revenue Code of 1954.

(b) It has been determined that you sustained no net operating loss in the taxable year ended November 30, 1954, allowable as a net operating loss carry-over and deduction in the taxable year ended November 30, 1955 as claimed by you.

COMPUTATION OF TAX
Taxable year ended November 30, 1955

Taxable income adjusted	$12,616.87
Combined normal tax and surtax:	
30% of $12,616.87	$ 3,785.06
Correct income tax liability	$ 3,785.06

Income tax assessed:	
Original, account No. CN 111587	None
Deficiency of income tax	$ 3,785.06
5% Penalty	$ 189.25

In re: Rosewood Hotel, Inc.
Los Angeles, California
A:R: 90D: CTF

WAIVER OF RESTRICTIONS ON ASSESSMENT AND COLLECTION OF DEFICIENCY IN TAX AND ACCEPTANCE OF OVERASSESSMENT

Pursuant to section 6213(d) of the Internal Revenue Code of 1954 or corresponding provisions of prior internal revenue laws, the restrictions provided in section 6213(a) of the Internal Revenue Code of 1954 or corresponding provisions of prior internal revenue laws are hereby waived and consent is given to the assessment and collection of the following deficiencies, together with interest on the tax as provided by law; and the following overassessments are accepted as correct:

DEFICIENCIES

Type of Tax	Year Ended	Tax	Penalty	Total
Income and excess profits tax	Nov. 30, 1954	$42,220.46	$2,111.02	$44,331.48
Income tax	Nov. 30, 1955	3,785.06	189.25	3,974.31

In re: Rosewood Hotel, Inc.
Los Angeles, California
A:R: 90D: CTF

WAIVER OF RESTRICTIONS ON ASSESSMENT AND COLLECTION OF DEFICIENCY IN TAX AND ACCEPTANCE OF OVERASSESSMENT

Pursuant to section 6213(d) of the Internal Revenue Code of 1954 or corresponding provisions of prior internal revenue laws, the restrictions provided in section 6213(a) of the Internal Revenue Code of 1954 or corresponding provisions of prior in-

ternal revenue laws are hereby waived and consent is given to the assessment and collection of the following deficiencies, together with interest on the tax as provided by law; and the following overassessments are accepted as correct:

DEFICIENCIES

Type of Tax	Year Ended	Tax	Penalty	Total
Income and excess profits tax	Nov. 30, 1954	$42,220.46	$2,111.02	$44,331.48
Income tax	Nov. 30, 1955	3,785.06	189.25	3,974.31

This copy to be retained by taxpayer.

Received and Filed October 7, 1958, T.C.U.S.

Served October 8, 1958.

[Title of Tax Court and Cause.]

MOTION TO DISMISS FOR LACK OF JURISDICTION

The Respondent Moves that the above-entitled case be dismissed for lack of jurisdiction.

In Support Thereof, respondent respectfully shows unto the Court:

1. That the statutory notice of deficiency from which this appeal is taken was mailed by registered mail to the petitioner on June 12, 1958.

2. That the postmark date stamped on the envelope containing the petition was October 3, 1958, according to the stamp impressed upon respondent's copy of the petition, which date was the 113th day after the mailing of the statutory notice of deficiency. Further, the petition was received and

filed on October 7, 1958, according to the official stamp of the Tax Court.

3. Accordingly, the petition herein was untimely filed within the requirements of Section 6213(a) and 7502(a) of the Internal Revenue Code of 1954, and the Court, therefore, is without jurisdiction to entertain this appeal.

Wherefore, it is prayed that this motion be granted.

/s/ ARCH M. CANTRALL,
Chief Counsel,
Internal Revenue Service.

Received and Filed December 8, 1958, T.C.U.S.

[Title of Tax Court and Cause.]

OPPOSITION TO MOTION TO DISMISS FOR LACK OF JURISDICTION

Comes now Rosewood Hotel, Inc., Petitioner above named, and opposes Respondent's motion to dismiss the above-entitled proceed for alleged lack of jurisdiction. This motion is based on the following grounds:

1. That the petition herein was timely filed within the requirements of Sections 6213(a) and 7502(a) of the Internal Revenue Code of 1954.

2. That the Court, therefore, is with jurisdiction to entertain this appeal.

3. That, in support of this opposition, there is attached hereto Exhibit A, which is an affidavit of Nathan Stein.

Wherefore, It Is Prayed that Respondent's motion not be granted and that a hearing on this motion be held in Los Angeles and preferably at the time that the matter is set on the Los Angeles calendar of the above-entitled court.

Dated: January 28, 1959.

/s/ JAMES J. ARDITTO,
Of Waters, Arditto & Waters,
Attorneys at Law.

EXHIBIT A

[Title of Tax Court and Cause.]

AFFIDAVIT IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS

State of California,
County of Los Angeles—ss.

Nathan Stein, being duly sworn, deposes and says:

That on the 17th day of July, 1958, there was personally served upon me by Revenue Agent R. A. Goddard the statutory notice of deficiency dated June 12, 1958, directed to Rosewood Hotel, Inc., and covering the fiscal years ended November 30, 1954, and November 30, 1955.

That attached to this affidavit is a true and correct copy of "receipt" prepared by said Revenue Agent Goddard and which was signed by your affiant upon being served with such statutory notice on July 17, 1958.

That said Agent Goddard signed such receipt at the time of such service.

/s/ NATHAN STEIN.

Subscribed and sworn to before me this 28th day of January, 1959.

[Seal] /s/ CHARLOTTE L. SMITH,
Notary Public in and for the State of California,
County of Los Angeles.

My Commission Expires September 4, 1960.

Received and Filed February 2, 1959, T.C.U.S.

Served February 3, 1959.

[Title of Tax Court and Cause.]

ORDER OF DISMISSAL

This case was called from the motions calendar at Washington, D. C., on February 4, 1959, for hearing on respondent's motion to dismiss the case for lack of jurisdiction alleging that the petition was not filed within the time prescribed by statute. The motion was argued by counsel for respondent. Petitioner filed on February 2, 1959, a request that the hearing on respondent's motion be held in Los

Angeles, California, and also a memorandum in opposition to respondent's motion. It appears from the record and the evidence before the Court that the petition was not filed with the Court within the time prescribed by statute. After due consideration, it is

Ordered: That petitioner's request filed February 2, 1959, is denied; respondent's motion is granted and the case is dismissed for lack of jurisdiction.

/s/ C. R. ARUNDELL,
Judge.

Entered February 9, 1959.

Served February 10, 1959.

[Title of Tax Court and Cause.]

MOTION TO VACATE ORDER OF DISMISSAL (RULE 19(e))

The Petitioner Moves that:

(1) The above-entitled Court should vacate its "Order of Dismissal" entered herein on February 9, 1959.

This Motion will be made upon the following grounds:

(a) New evidence has been discovered which was not available prior to this time;

(b) The Order of Dismissal is erroneous in law.

In Support of Said Motion, Petitioner respectfully submits the following for the Court's consideration:

(1) That, at the time Petitioner opposed the Respondent's Motion to Dismiss, Petitioner did not know that the Respondent had attempted, prior to July 17, 1958, to serve Petitioner by mailing the 90-day letter to 3421 West 2nd Street, Los Angeles, California, the former address of Petitioner.

(2) That knowledge of such attempt was first discovered when Petitioner's attorney had a telephonic conversation with Mr. Maiden (Assistant Regional Counsel) of Respondent's Los Angeles District Office shortly after receiving the Order of Dismissal of February 9, 1959.

(3) That Mr. Maiden, at that time, informed Petitioner's attorney that on June 12, 1958, the Internal Revenue Service had mailed, by registered mail, the 90-day letter in question to 3421 West 2nd Street, Los Angeles, but that it had been returned, marked "Not Known at This Address." That that was the reason why Mr. Goddard, Revenue Agent, personally served Nathan Stein on July 17, 1958, with the same original copy of said 90-day letter.

(4) That during the period of approximately December, 1957, through March 15, 1958, Revenue

Agents Goddard and Keller made an audit of Petitioner, for the fiscal taxable years ended November 30, 1954, and November 30, 1955, and during the course of said audit and at that time said Revenue Agents were told that:

(a) In February, 1955, the leasehold on the Casa Blanca Hotel, which was practically the sole asset of Petitioner, was lost because such property so leased was taken away from Petitioner's lessor;

(b) That from March, 1955, to the present time Petitioner has had no business activities (other than winding up its affairs during the first two or three months succeeding February of 1955) and for all practical purposes Petitioner did not exist as a corporation, or any other type of entity;

(c) That long prior to 1958 the portion of the building at 3421 West 2nd Street, Los Angeles, California, which was occupied as an office by Petitioner—when it was functioning as a corporation—was completely destroyed by fire;

(d) That the same fire that destroyed said office location of Petitioner also destroyed all the books and records of Petitioner;

(e) That Petitioner did not file any Federal Income Tax Return for the fiscal year ended November 30, 1956, for the reason that it was practically extinct, was not functioning, had no business or other type of activity and was, in effect, a mere shell corporation. Further, that no returns would be filed for any future year, because, as

aforesaid, the corporation was practically extinct and not functioning;

(f) That Nathan Stein was the sole stockholder of Petitioner and had been and was an officer and director of Petitioner, and that his (Nathan Stein's) office or place of business was at the Temple Hospital on Hoover Street in Los Angeles;

(g) That any 90-day letter for Petitioner should be mailed or delivered to Nathan Stein at Temple Hospital on Hoover Street in Los Angeles.

(5) That all of the foregoing will, at the hearing of these motions, be established by testimony of Revenue Agents Goddard and Keller, Nathan Stein, Erwin Hassen, Harvey Riley and a Mr. Newman.

(6) Accordingly, the petition herein was timely filed within the requirements of Sections 6213(a) and 7502(a) of the Internal Revenue Code of 1954, and the Court, therefore, has jurisdiction of the same.

See: Boren vs. Riddell, 241 Fed. (2nd) 670.

Whereupon, it is prayed that this Motion be granted.

/s/ JAMES J. ARDITTO,
Attorney for Petitioner.

Received and Filed March 2, 1959, T.C.U.S.

[Title of Tax Court and Cause.]

MOTION FOR LOS ANGELES HEARING ON MOTION TO VACATE ORDER OF DISMISSAL

Comes now Petitioner, above named, through its undersigned attorney, and moves the Court as follows:

1. That the hearing on Petitioner's Motion to Vacate Order of Dismissal be calendared at Los Angeles, California, in lieu of Washington, D. C.

2. That, pursuant to Rule 27 (a) (1), good cause for holding the hearing elsewhere than in Washington, D. C., is set forth in the affidavit attached hereto in support of this motion.

3. That for said good cause the motion for Los Angeles hearing, as well as the Motion to Vacate Order of Dismissal, should be held in Los Angeles, California.

Dated: March 13, 1959.

/s/ JAMES J. ARDITTO,
Attorney for Petitioner.

Affidavit in Support of Motion for Los Angeles Hearing

State of California,
County of Los Angeles—ss.

James J. Arditto, being duly sworn, deposes and says:

That he is the attorney for the petitioner in the case now pending in the Tax Court of the United States, entitled "Rosewood Hotel, Inc., vs. Commisioner, Docket No. 77084."

That your affiant is of the opinion that the following sufficiently states good cause for holding any hearings in the Rosewood Hotel, Inc., matter in Los Angeles, California, rather than in Washington, D. C.:

That in support of the Motion to Vacate Order of Dismissal, your affiant intends to produce the following witnesses on behalf of Petitioner's motion:

(a) R. A. Goddard.

(b) Erwin E. Hassen.

(c) Betty Stein.

(d) Harvey Riley.

(e) Gordon Keller.

(f) Edward G. Nedow.

(g) Nathan Stein.

(h) Personnel in the local office of the Internal Revenue Service who handled the Notice of Deficiency in question and whose names are unknown to your affiant at this time.

That all of said witnesses are residents of the City of Los Angeles, California, and that, in order to bring them to Washington, D. C., Petitioner would have to expend approximately $7,500.00. That Petitioner, however, has been a defunct cor-

poration ever since on or about February, 1955, and has no known assets of any type or description. That in order to bring such witnesses to Washington, D. C., a present or former officer and/or director of said petitioner would have to supply such expense money out of his or her own personal funds. That said officers and/or directors have stated that they would not advance such moneys on behalf of the petitioner.

That under these circumstances Petitioner would be deprived of the testimony of said witnesses and thus would also be deprived of a fair hearing before the Tax Court and, as a practical matter, might as well abandon its motion.

That even if the Tax Court would authorize the use of affidavits in support of said motion, your affiant, as attorney for Petitioner, would insist upon the "live" testimony of at least Witnesses Goddard and Keller, and also other personnel in the local office of the Internal Revenue Service who have personal knowledge of the mailing of the so-called Deficiency Notice in question.

Furthermore, your affiant would want to produce—for the consideration of the Tax Court—all documentary evidence surrounding and relating to the mailing of the Deficiency Notice in question and this can best be done, in the opinion of your affiant, by having the hearing held in Los Angeles, California.

Your affiant does not use the airlines in traveling and, therefore, would be required to expend at

least ten days away from his office for the purpose of presenting a matter which, at the most, will take up one day. Furthermore, Petitioner is without funds to pay your affiant for said services and said ten-day period of time.

Your affiant has many clients other than Petitioner and his schedule is such for the next several months that he cannot afford to spend ten days on this Washington trip when only one day would be expended if the matter were heard in Los Angeles.

All of the witnesses proposed to be placed on the stand by Petitioner in this matter should not be required to expend the time going back and forth to Washington, D. C., in a matter of this type when everybody's convenience would be best served by holding the hearing in Los Angeles, California.

For each and all of the foregoing reasons, your affiant respectfully believes and, therefore, respectfully submits that he has established good cause for the holding of the hearing in question in Los Angeles, California, rather than in Washington, D. C. Your affiant further respectfully states that unless this motion is granted he will request permission of the client to withdraw from the case for the obvious reason that your affiant respectfully believes and respectfully submits that neither he nor any other attorney could properly represent the petitioner in Washington, D. C.,—in this matter —without the vitally necessary witnesses mentioned.

Your affiant respectfully notes that he cannot come to Washington, D. C., to argue this motion for change of hearing from Washington, D. C., to Los Angeles, California, for the same economical and professional reasons mentioned above and, therefore, respectfully submits this motion on this affidavit and respectfully requests the Court that, in order that Petitioner may have a fair hearing in this matter, the motion to hold the hearing in Los Angeles, California, should be granted.

/s/ JAMES J. ARDITTO.

Subscribed and sworn to before me this 13th day of March, 1959.

[Seal] /s/ CHARLOTTE L. SMITH,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires September 4, 1960.

Received and Filed March 16, 1959, T.C.U.S.

[Title of Tax Court and Cause.]

ORDER

The Commissioner filed a motion to have this case dismissed for lack of jurisdiction. He alleged as his reason for such a dismissal that the petition had not been filed within 90 days after the registered mailing of the notice of deficiency to the petitioner. The petitioner filed a document in oppo-

sition to the motion and, thereafter, hearing on the motion was held at which time facts were proven showing that the petition had not been filed within 90 days of the date on which the notice of deficiency had been mailed to the petitioner by registered mail as required by law, and the Court entered an order on February 9, 1959, dismissing the case for lack of jurisdiction.

Thereafter, the petitioner filed a motion to vacate the order of dismissal and to reinstate the case within the jurisdiction of the Court on the ground that the petition was timely filed. The facts alleged by the petitioner in support of this motion are to the effect that the petitioner, prior to June 12, 1958, had told Revenue Agents Goddard and Keller that all communications, and particularly any notice of deficiency relating to the petitioner, should be mailed to Nathan Stein at Temple Hospital on Hoover Street in Los Angeles; but the notice of deficiency on which this proceeding is based was mailed by registered mail to the petitioner at 3421 West 2nd Street, Los Angeles 4, California, instead of as directed by the petitioner; that notice was returned by the post office to the sender marked "Not Known at This Address"; and the notice was then delivered in person by Revenue Agent Goddard to Nathan Stein on a date which was within 90 days of the filing of the petition.

The petitioner, apparently, does not realize that the Tax Court would have no jurisdiction in this case if he proved that the Commissioner failed to

mail a notice of deficiency to the petitioner by registered mail at its address last known to the Commissioner, or that the notice of deficiency was not mailed to the petitioner's last known address within the knowledge of the Commissioner but was mailed by registered mail to some other address, was returned to the sender by the post office and then was delivered to the petitioner in some way other than by registered mail. Thus, the order of dismissal for lack of jurisdiction already entered in this case is proper regardless of whether it is justified on the ground that the petition had not been filed within 90 days of the date of the mailing of the notice of deficiency by registered mail or that the Commissioner never mailed a notice of deficiency by registered mail to the petitioner's last known address.

The petitioner has requested that the hearing on its motion be heard in Los Angeles whereas the Clerk of the Court had already set the motion for hearing in Washington on April 8, 1959. But it now is clear to the Court that the petitioner has not given any meritorious reason for having a hearing at any place on this particular motion.

After due consideration, the motion to vacate is denied and the notice setting that motion for hearing in Washington on April 8, 1959, is cancelled.

/s/ J. E. MURDOCK,
Judge.

Dated: Washington, D. C., March 20, 1959.

Served March 26, 1959.

[Title of Tax Court and Cause.]

MOTION FOR REHEARING OF ORDER DENYING MOTION TO VACATE AND CANCELLING HEARING ON SAID MOTION, SAID ORDER BEING MADE OR ENTERED ON MARCH 20, 1959

Comes now Petitioner, above-named, through its undersigned attorney, and moves the Court as follows:

1. That the above-entitled Court should reconsider its order denying the motion to vacate and cancelling the hearing thereon, which had been scheduled for April 8, 1959.

2. That, upon such reconsideration and rehearing, the hearing on the motion to vacate, which had been filed on or about March 2, 1959, should be rescheduled for hearing in Los Angeles, California.

3. That after hearing evidence from both parties pertaining to the subject matter of said motion filed on or about March 2, 1959, the Court grant said motion, or at least, in denying the same, clearly state the specific reason why the above Court believes that it does not have jurisdiction to hear the above-entitled matter.

4. Attached hereto is a memorandum in support of this motion.

Dated: April 8, 1959.

/s/ JAMES J. ARDITTO,
Attorney for Petitioner.

Received and filed April 13, 1959, T.C.U.S.

Denied April 14, 1959, J. E. Murdock, Judge.

Served April 15, 1959.

In the United States Court of Appeals
For the Ninth Circuit

Tax Court Docket No. 77084

ROSEWOOD HOTEL, INC.,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

PETITION FOR REVIEW

Taxpayer, the Petitioner in this cause, by its attorney, James J. Arditto, hereby files its petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision or order of dismissal "for lack of jurisdiction" by the Tax Court of the United States, rendered or entered on February 9, 1959, and taxpayer respectfully shows:

I.

This petition is filed pursuant to Sections 7481, 7482 and 7483 of the Internal Revenue Code.

II.

The Petitioner, Rosewood Hotel, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal office in Los Angeles, California.

III.

The excess profits tax and income tax returns of the petitioner for the fiscal years ended November 30, 1954, and November 30, 1955, were filed with the District Director of Internal Revenue for the Sixth (6th) District of California at Los Angeles, California. The United States Court of Appeals for the Ninth (9th) Circuit is the Court of Appeals for the circuit in which said District Director's Office is located.

IV.

Nature of Controversy

The controversy involves the question of whether the Tax Court of the United States properly entered its "Order of Dismissal" for alleged lack of jurisdiction on February 9, 1959.

On or about June 12, 1958, the respondent, Commissioner of Internal Revenue, through R. A. Riddell, District Director of Internal Revenue at Los Angeles, California, mailed a Notice of Deficiency, for the taxable years ended November 30,

1954, and November 30, 1955 (for federal income and excess profits tax for the former year and federal income tax for the latter year) to petitioner and mailed the same to 3421 West Second Street, Los Angeles 4, California. This notice was returned to said District Director's Office with the words "Not known at this address" stamped on the envelope in which the said notice was mailed.

Thereafter and on July 17, 1958, this same Notice of Deficiency was personally served on one of petitioner's officers at his office at 235 North Hoover Street, Los Angeles 4, California.

On October 3, 1958, petitioner mailed its Petition for Review of such deficiency determination to the Tax Court of the United States and this petition was received and filed by the Clerk of said Tax Court on October 7, 1958.

In other words, the petition was filed with the Tax Court on or about the 113th day after the "mailing" of the Notice of Deficiency, but on or about the 82nd day after the "personal service" of said Notice of Deficiency.

The respondent, through his chief counsel, filed a Motion to Dismiss the petition for lack of jurisdiction and, as aforesaid, the Tax Court, on February 9, 1959, entered its said Order of Dismissal.

Thereafter and within thirty (30) days of the entering of said Order of Dismissal, petitioner filed, with the Tax Court, its Motion to Vacate said Order of Dismissal.

On March 20, 1959, said Motion to Vacate was denied by the Tax Court of the United States.

Thereafter and within thirty (30) days of said order denying the Motion to Vacate, petitioner filed a motion for rehearing of said Order entered on March 20, 1959, and said Motion for Rehearing was denied by the Tax Court of the United States on April 14, 1959.

The respondent claimed that the Tax Court lacked jurisdiction because petitioner failed to file its Petition for Redetermination with the Tax Court of the United States within ninety (90) days of June 12, 1958. The Tax Court granted respondent's Motion to Dismiss upon having presented to it evidence which disclosed that the statutory Notice of Deficiency was mailed to the address disclosed by the returns of petitioner for the years in question.

Petitioner, in its Motion to Vacate said Order of Dismissal, set forth and disclosed to the Tax Court of the United States that it was entirely unaware of the fact that said statutory notice had been mailed to said address until, after receiving the Order of Dismissal, petitioner's counsel talked to the Regional Counsel's Office in Los Angeles and learned for the first time that the statutory notice had been so mailed.

In further support of its Motion to Vacate the Order of Dismissal, petitioner, in effect, offered to prove that the mailing address used by the respond-

ent in so mailing said statutory notice was not the address of petitioner "last known" to the respondent, but that actually 235 North Hoover Street, Los Angeles 4, California, was the address "last known" to the respondent.

In petitioner's Motion to Vacate and in its Motion for Rehearing it asked the Tax Court to hold a hearing in Los Angeles, California, for the purpose of determining, from the evidence offered by both the petitioner and the respondent, whether the statutory notice was sent to petitioner's address "last known" to the respondent.

In its Order of March 20, 1959—denying the Motion to Vacate—the Tax Court in effect said that it made no difference whether it lacked jurisdiction because:

(1) Petitioner failed to file its Petition for Redetermination within ninety (90) days of the mailing of the statutory Notice of Deficiency to the "correct" address of petitioner; or

(2) Respondent failed to mail the statutory Notice of Deficiency to the correct "last known" address of petitioner.

V.

Petitioner, being aggrieved by the said Orders of February 9, 1959, March 20, 1959, and April 14, 1959, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

VI.

Assignments of Error

The petitioner assigns as error the following acts and omissions of the Tax Court of the United States:

(1) Dismissing, on February 9, 1959, petitioner's Petition for Redetermination on the alleged ground that the Tax Court lacked jurisdiction because petitioner failed to file its Petition for Redetermination within ninety (90) days of the date the statutory Notice of Deficiency was mailed.

(2) Refusing to vacate said Order of Dismissal after its attention was called to the fact that it was petitioner's contention that the statutory Notice of Deficiency in question was not mailed to petitioner's address "last known" to respondent.

(3) Refusing to hold a hearing, as requested by petitioner, to hear evidence offered by petitioner which would prove that the statutory Notice of Deficiency, in question, was not mailed to the last known address of petitioner.

(4) In deciding that it made no difference whether it "lacked jurisdiction" because, on the one hand, petitioner failed to file its petition within ninety (90) days of June 12, 1958, or, on the other hand, because respondent failed to mail the statutory Notice of Deficiency to the address of petitioner last known to respondent.

(5) In deciding that the Tax Court can only

acquire jurisdiction in matters of this type if the Commissioner of Internal Revenue sends a statutory Notice of Deficiency to a taxpayer "by registered mail" to taxpayer's last known address. Further, that it cannot acquire jurisdiction where the said statutory notice is "personally served" on taxpayer and the latter within ninety (90) days thereof filing a Petition for Redetermination with the Tax Court.

/s/ JAMES J. ARDITTO,
Attorney for Petitioner.

Duly verified.

Received and filed May 4, 1959, T.C.U.S.

Tax Court of the United States

Motions Calendar

TRANSCRIPT OF PROCEEDINGS

Washington, D. C.,
Wednesday, February 4, 1959.

Met, pursuant to notice, at 10:00 a.m.

Before: Honorable C. Rogers Arundell, Judge.

Also Present: Honorable William M. Drennen, Judge.

* * *

The Clerk: Docket 77084, Rosewood Hotel, Inc.
Mr. Whitley: If the Court please——

The Clerk: Excuse me just a minute, Mr. Whitley.

The Court: All right.

Mr. Whitley: If the Court please——

The Court: I might say that there is a request for a hearing of this matter in Los Angeles. If it is solely on the question of jurisdiction, I think——

Mr. Whitley: I think that the determination of that will obviate any necessity for a hearing out there.

The Court: Go ahead.

Mr. Whitley: The respondent moves to dismiss for lack of jurisdiction on the ground that the proceeding was not timely-filed.

The deficiency notice, standard notice, was issued to the petitioner, sent by registered mail on June 12th, 1958.

Now, the 90-day period as provided by statute for the filing of the petition from determination, from that date, would expire on September 10, 1958, which was 113 days—I will go back a step further.

Under the 1954 Code if a petitioner places his proceeding, or the petition in the mail and it is postmarked, that constitutes the filing of it under the Code.

In this case the envelope bearing the petition was dated October 3, and that was 113 days after the issuance of the deficiency notice. The petition wasn't timely filed with the Court, of course, until October 7. So under either consideration the petition was late. As a matter of fact, it couldn't be timely under the 1954 Code because it was more

than 90 days after the mailing of the deficiency notice before this petition was posted.

So, more than that 90 days being involved from the time of the mailing of the deficiency notice till the petition was posted, then under the 1954 Code you can't consider the posting date but the date that it was received here. One was more than 90 days and I am going at this time to offer a photostat copy of the mailing list showing that the proceeding was, that the petition was—the ninety days was June 12, 1958—and ask the Court to dismiss the proceeding.

The Court: It is what date?

Mr. Whitley: It was June 12, 1958.

Is that admitted?

The Court: That is received.

Mr. Whitley: Very well. On the basis of that showing if the Court please, I move that the proceeding be dismissed for lack of jurisdiction.

The Court: I am going to deny the motion requesting that the hearing be transferred to Los Angeles and then grant the motion to dismiss for lack of jurisdiction.

Mr. Whitley: You of course will consider the petitioner's memorandum. It is one page; as not material at all to the issue here? But he has filed a memorandum, short memorandum in opposition?

The Court: You mean affidavit?

Mr. Whitley: It involves an affidavit, yes.

It doesn't change the factual setup at all.

The Court: All right.

Received and Filed February 5, 1959, T.C.U.S.

[Title of Tax Court and Cause.]

DOCKET ENTRIES

1958

Oct. 7—Petition filed: Fee paid 10/7/58. Served Oct. 8, 1958.

Oct. 7—Request by petr. for trial at Los Angeles, Calif. Served Oct. 8, 1958.
Granted: Oct. 7, 1958.

Oct. 7—Entry of appearance by James J. Arditto, for petr. Served Oct. 8, 1958.

Dec. 8—Motion by resp. to dismiss for lack of jurisdiction.
Granted: 2/9/59.

Dec. 30—Notice of hrg. Feb. 4, 1959, Wash., D.C., on resp. motion.

1959

Feb. 2—Motion by petr. opposition to motion to dismiss for lack of jurisdiction.
Denied: 2/9/59.

Feb. 2—Motion by petr. for hearing on respondent's motion of Dec. 8, 1958, to be held in Los Angeles, Calif. Served Feb. 12, 1959.
Denied: 2/9/59.

Feb. 4—Hearing on resp. motion to dismiss.

Feb. 5—Transcript of proceedings, Feb. 4, 1959, filed.

Feb. 9—Order, that petr. request filed Feb. 2, 1959, is denied; resp. motion is granted and case is dismissed for lack of jurisdiction.

Mar. 2—Motion by petr. for hearing to be held in Los A., Calif.

Denied: 3/4/59.

Mar. 2—Motion by petr. to Vacate Order of Dismissal.

Denied: 3/20/59.

Mar. 6—Notice of Hrg. April 8, 1959, Wash., D.C., on Petr's. motion.

Mar. 16—Motion by petr. for Los Angeles hearing on motion to vacate order of dismissal be calendared at L. A. Calif.

Mar. 20—Ordered that the motion to vacate is denied and the notice setting that motion for hrg. in Wash. on April 8, 1959, is cancelled, J. Murdock. Served Mar. 26, 1959.

Apr. 13—Motion by petr. for rehearing of Order denying motion to vacate and cancelling hearing on said motion, said Order being made or entered on March 20, 1959. Served Apr. 15, 1959.

Denied: 4/14/59.

Appellate Proceedings

May 4—Petition for Review by U.S.C.A. 9th, filed by petr.

May 4—Designation of contents of record on rev. filed by petr.

May 4—Proof of Service of petition for rev. and designation filed.

May 5—Proof of Service of petition for rev. filed.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 15, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation," including respondent's exhibit A, admitted in evidence, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case, as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 3rd day of June, 1959.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

In the United States Court of Appeals
For the Ninth Circuit

Case No. 16509

ROSEWOOD HOTEL, INC.,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

STATEMENT OF POINTS AND DESIGNATION OF RECORD FILED PURSUANT TO RULE 17

Taxpayer, the Petitioner in this cause, by its attorney, James J. Arditto, hereby files its statement of points on which it intends to rely on this appeal, and its designation of the record in the Tax Court of the United States which is material to the consideration of this appeal for review, all in accordance with Subparagraph 6 of Rule 17 of the above-entitled Court:

A. Designation of Points Upon Which Petitioner Will Rely

The Petitioner designates the following points which it will rely upon on this appeal for review:

(1) Petitioner adopts as such designation the "Assignments of Error" contained at pages 5, 6 and 7 of the "Petition for Review" filed by the above-

named Petitioner with the Clerk of the Tax Court on or about April 30, 1959.

B. Designation of Contents of Record on Review

The Petitioner hereby designates the following as the record which is material to the consideration of the appeal for review herein:

(1) Petitioner adopts as such designation the Designation of Contents of Record on Review which it filed with the Clerk of the Tax Court on or about April 30, 1959.

Dated: June 30, 1959.

/s/ JAMES J. ARDITTO,
Attorney for Petitioner.

[Endorsed]: Filed July 1, 1959, U.S.C.A.

[Endorsed]: No. 16509. United States Court of Appeals for the Ninth Circuit. Rosewood Hotel, Inc., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed June 22, 1959.

Docketed: June 24, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.